1272

(18,694.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 466. 143

NORTHERN PACIFIC RAILWAY COMPANY, PETITIONER,

vs.

LOUISE H. ADAMS AND FRANK H. ADAMS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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a *Transcript of Record.*

In the United States Circuit Court of Appeals for the Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
LOUISE H. ADAMS and FRANK H. ADAMS, Defendants in Error.
} No. 707.

In error to the circuit court of the United States for the district of Washington, eastern division, Spokane.

1 In the Circuit Court of the United States for the District of Washington, Eastern Division, April Term, 1899.

Be it remembered, that on the 10th day of March, 1899, there was duly filed in said circuit court of the United States for the district of Washington, eastern division, a complaint, in words and figures as follows, to wit:

UNITED STATES OF AMERICA:

In the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Eastern Division.

LOUISE H. ADAMS and FRANK H. ADAMS, Plaintiffs,
vs.
NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendant.

Complaint.

Come now the plaintiffs, above named, and for cause of action against defendant company, above named, complain and allege:

1. That the plaintiffs, Louise H. Adams and Frank H. Adams are, respectively, the widow and son, and the sole heirs at
2 law, of Jay H. Adams, deceased; that said plaintiff, Louise H. Adams, and said deceased intermarried on the 27th day of December, 1870, and that said plaintiff, Frank H. Adams, is the sole surviving issue of said marriage.

2. That said plaintiffs at all the times hereinafter mentioned were, and now are, citizens of the State of Washington.

3. That during all the times hereinafter mentioned said defendant company was, and now is, a corporation, organized and doing business under the laws of the State of Wisconsin, and was, and now is, a citizen of the State of Wisconsin.

4. That during all the times hereinafter mentioned said defendant company was the owner of, and was operating, a certain railway known as the Northern Pacific railway, extending from Lake Superior, in the State of Wisconsin, to Puget sound, in the State of

Washington, over and through the State of Idaho, together with the track, cars, and locomotives thereunto belonging.

5. That on the 13th day of November, 1898, the said deceased, at the town of Hope, in the county of Kootenai, State of Idaho, entered a train of cars, belonging to said defendant company, for the purpose of being carried from said town of Hope to Spokane, in the State of Washington, which said train of cars was a regular passenger train, and was then and there being operated by said defendant company, upon the said railway so owned by it, as aforesaid, as a common carrier of passengers upon and over said railway, and that said defendant company, there and there,
3 accepted said deceased as a passenger thereon, for the purpose of safely carrying him from said town of Hope, to said city of Spokane.

6. That on said day, while said deceased was being carried thereon, as aforesaid, the said defendant company operated, and caused to be operated, its said train of cars so negligently and carelessly as to cause the death of said Jay H. Adams.

7. That on said day, and for a long time prior thereto, it was, and had been, the custom of said defendant company, generally known and long established, to have attached to its trains, operated upon said railway, for the carriage of passengers, for the comfort and convenience of said passengers, a car in which said passengers might secure their meals, cigars, and such other things as might contribute to their comfort and convenience, while said train was in motion, which said car was commonly known as a dining-car, and that on said day, such dining-car was attached to said train of cars, and that the said defendant company extended to all its passengers, including said deceased, an invitation to visit said dining-car, whenever it suited their comfort or convenience so to do.

8. That to enable passengers to visit said dining-car on its train in safety, as aforesaid, it was necessary for the said defendant company, and it was its duty to enclose and guard the platforms of the cars on its said train and that the appliances in common and general use for this purpose, prior to and at the time aforesaid, were those commonly known as and constituting the vestibuling of
4 cars, which consisted of enclosing and making a continuous passage of the abutting platforms of connecting cars.

9. That on said day, and for a long time prior thereto, the said defendant company had caused it to be generally known that its trains, for the carriage of passengers, were vestibuled throughout, for the safety and protection of said passengers while passing from one car to another upon its trains, and from the other cars to and from said dining car, and that all the platforms of said trains were so enclosed and protected by vestibules as to make it entirely safe for its passengers to use the same in passing from car to car, and especially in passing to and from such dining-car, and that, on said day the train of cars aforesaid was vestibuled, as aforesaid, except as hereinafter specifically set forth, and that, upon the said train of cars in which said deceased was so traveling, at the time of his death, as hereinafter mentioned, there was maintained upon said

train, by said defendant company, for the accommodation and convenience of the passengers on said train, free and uninterrupted access through said vestibules for passing through the same from car to car, and across and over all the platforms of the cars attached to said train.

10. That on said day the said deceased took a seat in the car on said train known as the smoking-car, the said smoking-car being located in said train some distance in front of the said dining-car, and that in said train the said defendant company had negligently and carelessly caused a car to be placed, and permitted the
5 same to be and remain, in said train, the two platforms of which said car were not vestibuled nor guarded in any manner whatever.

11. That on said day, and a very few moments after said train left the said town of Hope, and while said train was running toward the next station on said road, the said deceased left said smoking-car to visit said dining-car, for the purpose of purchasing cigars, which were kept in said car, for sale to the passengers on said trains of said defendant company.

12. That having purchased said cigars the said deceased left said dining-car for the purpose of returning to said smoking-car, and that while passing over one of said unguarded and unvestibuled platforms, through and because of the negligence of defendant company in leaving the platforms of said car in said train unvestibuled and unguarded, as aforesaid, by the movements of said train, said deceased was thrown from said train and killed.

13. That said defendant company carelessly and negligently left an opening at the side of the platform of one of the cars on said train, used for entrance and exit, unguarded while said train was in motion, and that while passing over said platform as aforesaid, through and because of defendant company's failure to guard said opening, deceased was precipitated through said unguarded opening by the movements of said train and killed.

14. That at the time and place of said injury to deceased said defendant company was running its said train at a high and
6 dangerous rate of speed, and that through and because of the negligence of said defendant company in so running its said train at a high and dangerous rate of speed, said deceased was thrown from said train and killed.

15. That at a short distance from the said town of Hope, there was a curve in defendant company's track over which said train had to pass, and that said defendant company ran its train around said sharp curve at a high and dangerous rate of speed, and that, through and because of defendant company's negligence in so running its said train around said curve, deceased was, at said curve, thrown from said train and killed.

16. That by reason of the negligence and carelessness of the defendant company, as aforesaid, plaintiffs were compelled to, and did, expend the sum of four hundred and twenty-four ($424) dollars as funeral expenses incurred in the interment of said deceased.

17. That by reason of the death of the husband and father of

plaintiffs, through the negligence and carelessness of the defendant company, as aforesaid, plaintiffs have been damaged in the sum of one hundred thousand ($100,000) dollars.

Wherefore, plaintiffs pray judgment against defendant company in the sum of one hundred thousand four hundred and twenty-four ($100,424) dollars, and for their costs and disbursements herein.

VOORHEES & VOORHEES,
Attorneys for Plaintiffs.

7 STATE OF WASHINGTON, } ss:
County of Spokane, }

Frank H. Adams, being first duly sworn, on oath states that he is one of the plaintiffs in the above-entitled cause; that he has heard read the foregoing complaint and knows the contents thereof, and that the same is true, as he verily believes.

FRANK H. ADAMS.

Subscribed and sworn to before me this 9th day of March, 1899.
[SEAL.] C. S. VOORHEES,
Notary Public in and for the State of Washington, Residing in Spokane.

(Endorsed:) Filed March 10, 1899. In the United States circuit court. A. Reeves Ayres, clerk, by James O'Neill, deputy.

8 And afterwards, to wit, on the 10th day of March, 1899, there was duly issued out of said court a summons, in the words and figures as follows, to wit:

UNITED STATES OF AMERICA:

In the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Eastern Division.

LOUISE H. ADAMS and FRANK H. ADAMS, Plaintiffs,
vs.
NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendant.

Action brought in the said circuit court, and the complaint filed in the office of the clerk of said circuit court in the city of Spokane, county of Spokane, State of Washington.

Voorhees & Voorhees, plaintiffs' attorneys.

Summons.

The President of the United States of America to Northern Pacific Railway Company, a corporation, Greeting:

9 You are hereby summoned to appear in the circuit court of the United States, ninth judicial circuit, district of Washington, eastern division, at the city of Spokane, within twenty days

after service of this summons, exclusive of the day of service, and defend the above-entitled action in the court aforesaid; and in case of your failure so to do, judgment will be rendered against you, according to the demands of the complaint, now on file in the office of the clerk of said court; a copy of which complaint is herewith served upon you.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, this 10th day of March, in the year of our Lord one thousand eight hundred and ninety-nine, and of our Independence the one hundred and twenty-third.

[SEAL OF THE COURT.]

A. REEVES AYRES, *Clerk*,
By JAMES O'NEILL,
Deputy Clerk.

UNITED STATES MARSHAL'S OFFICE, }
District of Washington. }

I hereby certify that I received the within writ on the 10th day of March, 1899, and personally served the same on the 10th day of March, 1899, by delivery to and leaving with John W. Hill, general agent of N. P. R'y Co., at Spokane, Wash., said defendant named therein personally, at Spokane, county of Spokane, in said district, a certified copy thereof, together with a copy of the complaint,
10 certified to by A. Reeves Ayres, clerk of said circuit court, attached thereto.

March 10, 1899.

C. W. IDE,
United States Marshal,
By I. N. ARMENT, *Deputy*.

Marshal's Fees.

To service	$2.00
To mileage	.06
	$2.06

(Endorsed:) Filed March 10, 1899. A. Reeves Ayres, clerk, by James O'Neill, deputy clerk.

And afterwards, to wit, on the 30th day of March, 1899, there was duly filed in said court, in said cause, a motion to strike and make more definite and certain, in the words and figures following, to wit:

In the Circuit Court of the United States of America, Ninth Judicial Circuit, District of Washington, Eastern Division.

LOUISE H. ADAMS and FRANK H. ADAMS, Plaintiffs,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, Defendant.

Motion to Strike and Make Complaint More Definite and Certain.

Comes now the defendant, above named, The Northern Pacific Railway Company, by its attorneys, and moves this honorable court:

11 1. To strike from the complaint of plaintiffs herein the whole of paragraph six (6) thereof, for the reason that the same is redundant and irrelevant matter and not an allegation of facts, or of any fact, and for the reason that the same is a mere conclusion of law.

2. To strike from the complaint of plaintiffs herein, from paragraph eight (8) thereof, the following: "That, to enable the passengers to visit said dining-car on its train in safety as aforesaid, it was necessary for the said defendant company, and it was its duty, to enclose and guard the platforms of the cars on its said trains;" for the reason that the same is redundant and irrelevant matter, and it is not an allegation of facts, or of any fact, and that the same is a mere conclusion of law.

3. To strike from paragraph eight (8) thereof the following: "And that the appliances in common and general use for this purpose, prior to and at the time aforesaid, were those commonly known as, and constituting, the vestibuling of cars, which consisted in enclosing and making a continuous pas-age of the abutting platforms of connecting cars;" for the reason that the same is irrelevant and redundant matter.

Defendant further moves this honorable court to require plaintiffs to make their complaint herein more definite and certain in the following particulars, to wit:

That plaintiffs be required to make paragraph nine (9) of their said complaint herein definite and certain as to the allegations, or facts, therein attempted to be set up and alleged, for the reason that the same are now so indefinite and uncertain that the precise

12 nature thereof, and of the allegations or charges therein contained, is not apparent, and for the reason that, in the present condition thereof, defendant is unable to answer the same intelligently or at all.

STEPHENS & BUNN,
Attorneys for Defendant.

Due service of within motion by receipt of a true copy thereof admitted this 30th day of March, 1899.

VOORHEES & VOORHEES,
Attorneys for Plaintiffs.

(Endorsed:) Filed March 30, 1899. A. Reeves Ayres, clerk. By James O'Neill.

And afterwards, to wit, on the 7th day of April, 1899, there was duly filed in said court, in said cause, an order overruling motion to strike, and sustaining motion to make more definite and certain, in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Washington, Eastern Division.

LOUISE H. ADAMS and FRANK H. ADAMS, Plaintiffs,
vs.
NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendant.

Order Overruling Motion to Strike, Sustaining Motion to Make Complaint More Definite, etc.

The motion to strike parts of the complaint of the plaintiffs' complaint herein having come on regularly for hearing, and,
13 after argument of counsel, the court being fully advised in the premises;

It is ordered that the said motion to strike be, and the same is hereby, overruled; to which ruling and order of the court the defendant excepted, and its exception was allowed.

The motion of defendant to make the complaint more definite and certain also coming on regularly for hearing, and after argument of counsel, and the court being fully advised in the premises;

It is ordered that the said motion be, and the same is hereby, sustained; to which ruling and order of the court plaintiffs excepted and their exception was allowed.

Done in open court this 7th day of April, A. D. 1899.

C. H. HANFORD, *Judge.*

(Endorsed:) Filed April 7, 1899. A. Reeves, Ayres, clerk. By James O'Neill, deputy.

14 And afterwards, to wit, on the 8th day of April, 1899, there was duly filed in said court, in said cause, an amended complaint, in the words and figures following, to wit:

UNITED STATES OF AMERICA:

In the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Eastern Division.

LOUISE H. ADAMS and FRANK H. ADAMS, Plaintiffs,
vs.
NORTHERN PACIFIC RAILWAY COMPANY (a Corpora ion), Defendant.

Amended Complaint.

Come now the plaintiffs, above named, and for cause of action against defendant company, above named, complain and allege:

1. That the plaintiffs, Louise H. Adams and Frank H. Adams, are respectively, the widow and son, and the sole heirs at law, of Jay H. Adams, deceased; that said plaintiff, Louise H. Adams, and said deceased intermarried on the 27th day of December, 1870, and that said plaintiff, Frank H. Adams, is the sole surviving issue of said marriage.

15 2. That said plaintiffs at all the times hereinafter mentioned were, and now are, citizens of the State of Washington.

3. That during all the times hereinafter mentioned said defendant company was, and now is, a corporation, organized and doing business under the laws of the State of Wisconsin, and was, and now is, a citizen of the State of Wisconsin.

4. That during all the times hereinafter mentioned said defendant company was the owner of, and was operating, a certain railway known as the Northern Pacific railway, extending from Lake Superior, in the State of Wisconsin, to Puget sound, in the State of Washington, over and through the State of Idaho, together with the track, cars, and locomotives thereunto belonging.

5. That on the 13th day of November, 1898, the said deceased, at the town of Hope, in the county of Kootenai, State of Idaho, entered a train of cars, belonging to said defendant company, for the purpose of being carried from said town of Hope to Spokane, in the State of Washington, which said train of cars was a regular passenger train, and was then and there being operated by said defendant company, upon the said railway, so owned by it as aforesaid, as a common carrier of passengers upon and over said railway, and that said defendant company then and there accepted said deceased as a passenger thereon, for the purpose of safely carrying him from said town of Hope to said city of Spokane.

6. That on said day, while said deceased was being carried thereon as aforesaid, the said defendant company operated, and caused

16 to be operated, its said train of cars so negligently and carelessly as to cause the death of said Jay H. Adams.

7. That on said day, and for a long time prior thereto, it was, and had been, the custom of said defendant company, generally known and long established, to have attached to its trains, operated upon said railway, for the carriage of passengers, for the comfort and con-

venience of said passengers, a car in which said passengers might secure their meals, cigars, and such other things as might contribute to their comfort and convenience, while said train was in motion, which said car was commonly known as a dining-car, and that, on said day, such dining-car was attached to said train of cars, and that the defendant company extended to all its passengers, including said deceased, an invitation to visit said dining-car whenever it suited their comfort or convenience so to do.

8. That to enable passengers to visit said dining-car on its train in safety as aforesaid, it was necessary for the said defendant company, and it was its duty, to enclose and guard the platforms of the cars on its said train and that the appliances in common and general use for this purpose, prior to and at the time aforesaid, were those commonly known as and constituting the vestibuling of cars, which consisted of enclosing and making a continuous passage of the abutting platforms of connecting cars.

9. That on said day, and for a long time prior thereto, the said defendant company had caused it to be generally known that
17 its trains, for the carriage of passengers, were vestibuled throughout, for the safety and protection of said passengers while passing from one car to another upon its trains, and from the other cars to and from said dining-car, and that all the platforms of said trains were so enclosed and protected by vestibules as to make it entirely safe for its passengers to use the same in passing from car to car, and especially in passing to and from such dining-car.

10. That on said day the train of cars aforesaid was vestibuled, as aforesaid, except as hereinafter specifically set forth, and that, upon the said train of cars in which said deceased was so traveling, at the time of his death, as hereinafter mentioned, there was maintained upon said train, by said defendant company, for the accommodation and convenience of the passengers on said train, free and uninterrupted access through said vestibules for passing through the same from car to car, and across and over all the platforms of the cars attached to said train.

11. That on said day the said deceased took a seat in the car on said train known as the smoking-car, the said smoking-car being located in said train some distance in front of the said dining-car, and that in said train the said defendant company had negligently and carelessly caused a car to be placed, and permitted the same to be and remain in said train, the two platforms of which said car were not vestibuled nor guarded in any manner whatever.

12. That on said day, and a very few moments after said train left the said town of Hope, and while said train was running
18 toward the next station on said road, the said deceased left said smoking-car to visit said dining-car for the purpose of purchasing cigars, which were kept in said car for sale to the passengers on said trains of said defendant company.

13. That having purchased said cigars the said deceased left said dining-car for the purpose of returning to said smoking-car, and that while passing over one of said unguarded and unvestibuled platforms, through and because of the negligence of defendant company in

leaving the platforms of said car in said train unvestibuled and unguarded, as aforesaid, by the movements of said train, said deceased was thrown from said train and killed.

14. That said defendant company carelessly and negligently left an opening at the side of the platform of one of the cars on said train, used for entrance and exit, unguarded while said train was in motion, and that while passing over said platform as aforesaid, through and because of defendant company's failure to guard said opening, deceased was precipitated through said unguarded opening by the movements of said train and killed.

15. That at the time and place of said injury to deceased said defendant company was running its said train at a high and dangerous rate of speed, and that, through and because of the negligence of said defendant company in so running its said train at a high and dangerous rate of speed, said deceased was thrown from said train and killed.

16. That at a short distance from the said town of Hope,
19 there was a curve in defendant company's track over which said train had to pass, and that said defendant company ran its train around said sharp curve at a high and dangerous rate of speed, and that through and because of defendant company's negligence in so running its said train around said curve, deceased was, at said curve, thrown from said train and killed.

17. That by reason of the negligence and carelessness of the defendant company, as aforesaid, plaintiffs were compelled to, and did, expend the sum of four hundred and twenty-four ($424) dollars as funeral expenses incurred in the interment of said deceased.

18. That by reason of the death of the husband and father of plaintiffs, through the negligence and carelessness of the defendant company, as aforesaid, plaintiffs have been damaged in the sum of one hundred thousand ($100,000) dollars.

Wherefore, plaintiffs pray judgment against defendant company in the sum of one hundred thousand four hundred and twenty-four ($100,424) dollars, and for their costs and disbursements herein.

VOORHEES & VOORHEES,
Attorneys for Plaintiffs.

STATE OF WASHINGTON, } ss:
County of Spokane, }

Louise H. Adams, being first duly sworn, on oath states that she is one of the plaintiffs in the above-entitled cause; that she has heard read the foregoing amended complaint and knows the contents thereof, and that the same is true, as she verily belives.

LOUISE H. ADAMS.

20 Subscribed and sworn to before me this 7th day of April, 1899.

C. S. VOORHEES,
[SEAL.] *Notary Public in and for the State of Washington, Residing at Spokane, Washington.*

A true copy of the within amended complaint received this 8th day of April, 1899.

STEPHENS & BUNN,
Attorneys for Defendant Railway Company.

(Endorsed:) Filed April 8, 1899. A. Reeves Ayres, clerk. By James O'Neill, deputy.

And afterwards, to wit, on the 15th day of April, 1899, there was duly filed in said court, in said cause, an answer to amended complaint, in the words and figures following, to wit:

In the Circuit Court of the United States of America, Ninth Judicial Circuit, District of Washington, Eastern Division.

LOUISE H. ADAMS and FRANK H. ADAMS, Plaintiffs,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, Defendant.

Answer to Amended Complaint.

I.

Comes now the defendant, above named, and for answer to the amended complaint of the plaintiffs herein—

21 1. Denies that it has any knowledge or information sufficient to form a belief as to the allegations, or any allegations, contained in paragraph number one of said amended complaint.

2. Defendant admits the allegations contained in paragraph number two of said amended complaint.

3. Defendant admits the allegations contained in paragraph three of said amended complaint.

4. Defendant admits the allegations contained in paragraph number four of said amended complaint.

5. Defendant admits that on the 13th day of November, 1898, the said deceased, Jay H. Adams, at the town of Hope, in Kootenai county, State of Idaho, entered a train of cars belonging to said defendant company for the purpose of being carried from said town of Hope to Spokane in the State of Washington, which said train of cars, this defendant admits, was a regular passenger train and was then and there being operated by defendant upon said railway as a common carrier of passengers; but defendant denies that it then and there, or at all, accepted said deceased, Jay H. Adams, as a passenger thereon for the purpose of safely carrying him from said town of Hope to the said city of Spokane, and denies that it accepted the said deceased as a passenger for any purpose, or at all.

6. Defendant denies each and every allegation, matter, and thing contained in paragraph number six of said amended complaint.

7. Defendant admits that, on the day mentioned and referred to in paragraph number seven of said amended complaint, it

22 was and had been the custom of defendant company to have attached to its trains, operated upon said railway for the car-

riage of passengers, and for the comfort and convenience of said passengers, a car, commonly known as a "dining-car," in which passengers might secure meals and cigars, and admits that on said day such car known as dining-car was attached to the said train; but defendant denies each and every other allegation, matter, or thing contained in said paragraph number seven of said amended complaint, and defendant specifically denies that it extended to all, or any, of its passengers, or to the deceased, or to anyone, an invitation to visit said dining-car, whenever it suited their comfort or convenience so to do, and defendant alleges in this behalf that the cigars kept and sold, or the cigars which passengers might secure in the said dining-car, were kept only for, and sold only to, such passengers as had entered said car upon the invitation of said defendant for the purpose of, and at the proper time for securing meals, and further alleges in this behalf that the only invitation extended to its passengers, or to any passenger, or to the deceased, to visit said dining-car, was for the purpose of procuring meals, and then only when the cars, or the train, were or was at rest or standing still, and defendant denies that it extended to its passengers, or to any passenger, or to the deceased, an invitation to visit said dining-car at any time except when the cars, or the train, were or was standing still or at rest.

8. Defendant denies each and every allegation, matter and
23 thing contained in paragraph number eight of said amended complaint.

9. Defendant denies each and every allegation, matter, and thing contained in paragraph number nine of said amended complaint.

10. Defendant denies each and every allegation, matter, and thing contained in paragraph number ten of said amended complaint.

11. Defendant admits that on the day mentioned in paragraph numbered eleven of said amended complaint, the deceased, Jay H. Adams, took a seat in a car on said train, known as the smoking-car, and that the said smoking-car was located on said train some distance in front of said dining-car, and admits that a car was placed and permitted to be and remain in said train, the platforms of which said car were not vestibuled; but defendant denies each and every other allegation, matter, and thing contained in said paragraph numbered eleven of said amended complaint, and especially denies that defendant negligently or carelessly caused said unvestibuled car to be placed and permitted to be and remain on said train, and denies that the ends, or either end, of said car was unguarded in any manner whatever, or was in any manner, or otherwise, or at all, unguarded.

12. Defendant admits the allegations contained in paragraph number twelve of said amended complaint.

13. As to the allegations contained in paragraph number thirteen of said amended complaint, defendant admits that the deceased having purchased said cigars, left said dining-car to return to the
24 said smoking-car; but denies each and every other allegation, matter, or thing contained in said paragraph thirteen of said amended complaint contained.

14. Defendant denies each and every allegation, matter, and thing contained in paragraph number fourteen of said amended complaint.

15. Defendant denies each and every allegation, matter, and thing contained in paragraph number fifteen of said amended complaint.

16. As to the allegations contained in paragraph number sixteen of said amended complaint, defendant admits that a short distance from the said town of Hope there was a curve in the defendant company's track over which said train had to run; but defendant denies each and every other allegation, matter, and thing contained in said paragraph number sixteen of said amended complaint, and especially denies that it ran said train around said sharp curve, or around any sharp curve, or any curve, at a high or dangerous rate rate of speed.

17. Defendant denies each and every allegation, matter, and thing contained in paragraph number seventeen of said amended complaint.

18. Defendant denies each and every allegation, matter, and thing contained in paragraph number eighteen of said amended complaint.

Defendant denies that by reason of the negligence or carelessness, or either of them, or any negligence or carelessness or either of them, of defendant, or of any of its servants, agents, workmen or employees, or any or either of them, or otherwise, or at all, plaintiffs, or either of them, have been damaged in the sum of one hundred thousand dollars ($100,000), or in any other sum, or at all.

II.

Defendant further answering the complaint of the plaintiffs herein, and as a first and further affirmative answer and defense, alleges:

1. That the death of said deceased and the damage sustained by plaintiffs herein, if any damage they, or either of them, have sustained thereby, was caused by the carelessness and negligence of deceased, and by and through his own act and conduct; that by his own carelessness and negligence at the said time and place, the deceased, Jay H. Adams, contributed to and caused his own death. That, if deceased was killed at the time and place mentioned in the complaint therein, his death was caused without any fault or negligence and without any want of care or diligence or skill on the part of this defendant, or on the part of its servants, agents, workmen, or employees, or of any or either of them.

III.

Defendant further answering the amended complaint of plaintiffs, herein and as a second and further affirmative answer and defense, alleges:

1. That at the time of the happening of the accident alleged in the said amended complaint, if any accident happened as therein alleged or otherwise, the said deceased was entirely, perfectly, and thor-

oughly familiar with the trains, and with the operation of the
26 trains of and by this defendant, and with its track and the
nature of its track at and near the place where the accident if any, happened; and that the death of said deceased was caused by his own act and conduct.

2. That the risk and danger, if any there was, of being upon the train of defendant at the said time and place or upon the unvestibuled portion of said train, was perfectly apparent to and well known by the said deceased in all respects and to anybody and everybody so going thereon; and if any danger there was at the said time and place on account of going upon the said train or upon the unvestibuled portion thereof, the said deceased well knew thereof and voluntarily placed and put himself in such place of danger if the said place was a place of danger; all of which facts were well known to the said deceased at the time he went into and upon the said train and at all times thereafter. That deceased voluntarily assumed all risk and danger, if any there was, of placing himself in such position and of going over or upon the unvestibuled portion of said train at the said time and place.

3. That said deceased had for a long time immediately prior to his death been continuously employed as counsel and attorney for railroads and in and about the conduct and management of his business for such railroads and railway companies, he had frequent occasion to, and did very often, travel upon and over railroads in cars and trains of cars upon which there was no vestibuled car or cars and
upon which the ends of the cars, *i. e.*, the platform, were en-
27 tirely open, unenclosed, unvestibuled, and unprotected, and
that he did many times upon such unvestibuled and unprotected car and cars pass to and from the car and cars thereon, and from one car to another at places much more dangerous and where the curves were much shorter and sharper than at the point where the said accident or injury is alleged to have occurred upon the road of this defendant, and at times when such car or cars were going at a high rate of speed, and that deceased well knew if he went upon the platform of an unprotected car as alleged in the amended complaint the great danger and risk of injury which he ran in so doing.

4. That deceased was perfectly familiar with the speed of trains and well knew the speed of defendant's train at the time and immediately prior to the time of said accident, if any accident there was; and if such train was running at a high or dangerous rate of speed deceased was then and there well aware thereof and that notwithstanding such knowledge he voluntarily put himself in the position or positions which would subject him to the danger and risk hereinbefore spoken of. That deceased had many times tried cases and lawsuits for railroads and railway companies and in which the question of high and dangerous speed was involved, and from his knowledge and the knowledge acquired from the trial of such cases, and from his constant connection and continued familiarity with railroads, railway companies, and their means and methods, he was able to, and often did, accurately judge the speed of trains and

whether or not such speed was a high and dangerous rate of speed.

28 5. That in and upon said car designated as the "smoking-car," in which deceased took a seat upon entering said train of cars, there was and is commonly and generally, and upon said date and train there was a person, designated as the "news agent," who had for sale in the said car and at the said time and place, cigars of as good a brand and quality as any sold upon the said dining-car; that the said news agent was then and there upon the said train to the knowledge of said deceased, and that said news agent then and there had such cigars for sale to the knowledge of said deceased, and, therefore, there was no excuse or reason or occasion for the said deceased to go to or from the said dining-car as alleged in the amended complaint herein, and that if he did leave the said smoking-car and go to and return from the said dining-car, as therein alleged, or at all, at the said time and place, or otherwise, he voluntarily assumed whatever risk or danger there was in so doing.

6. That at the time of entering said train and at all times thereafter, up to the time of the accident alleged in said complaint, if any accident there was, and for a long time prior to his entering the said train, the said deceased well knew that there was a car, or cars, in the train, and in all trains run by this defendant for the carriage of passengers, which was not vestibuled; that deceased well knew the nature of the country through which the said train was about to run and was familiar with the fact that the track through such country had in it many sharp curves, and well knew the rate of speed at which the said train would run through the said country over which he was about to ride thereon; and that he well

29 knew that if he attempted to pass from one car to another, while the said train was passing through the said country there would be and exist great risk and danger of being thrown from the train while so doing.

7. That the train upon which deceased was riding at the time and place in question was the same kind of a train that defendant has run upon and over its said track ever since it has owned and operated the said line of railroad, to wit, since September 1st, 1896, and was the same kind of a train as is usually operated by other railroads and that the cars thereon were, and all of them were, of the same kind, character and description as are usually operated by other railroads.

IV.

Defendant further answering the amended complaint of plaintiffs herein, and for a further and third affirmative answer and defense thereto alleges:

1. That the said deceased, at the said time and place, was a gratuitous passenger; that he did not at the time and place, or at any time and place, pay any fare, or expect to pay any fare, and did not pay any fare when he boarded said train; that at the time and place mentioned therein said deceased was traveling upon a free and

gratuitous pass, to wit No. 6059; that the terms and conditions annexed thereto and a part thereof, and printed on the back thereof, were accepted and agreed to and signed by the deceased before boarding said train, and that deceased was fully cognizant and aware of all of the terms and conditions thereof; that the said con-
30 ditions and agreement were in words and figures as follows, to wit:

"*Conditions.*"

"This free ticket is not transferable, and, if presented by another person than the individual named thereon, or if any alteration, addition or erasure is made upon it, it is forfeited, and the conductor will take it up and collect full fare.

"The person accepting this free ticket agrees that the Northern Pacific Railway Company shall not be liable, under any circumstances, whether of negligence of the agents or otherwise, for any injury to the person, or for any loss or damage to the property, of the passenger using the same.

"I accept the above conditions.

"JAY H. ADAMS."

"This pass will not be honored unless signed in ink by the person for whom issued."

That the said contract was made, entered into, executed and delivered within the State of Washington, United States of America.

2. That the deceased was not a passenger for hire, but was a purely gratuitous passenger upon the terms and conditions and subject to the provisions above set forth.

Wherefore, defendant prays that plaintiffs have and take nothing by their action herein; that it go hence without day, and that defendant have and recover of and from plaintiffs its costs and disbursements herein.

STEPHENS & BUNN,
Attorneys for Defendant.

31 STATE OF WASHINGTON, } ss:
County of Spokane, }

Jno. W. Hill, being first duly sworn, upon oath deposes and says that he is the general agent of said defendant in and for the city and county of Spokane, Washington, and makes this verification for and on its behalf; that he has read the foregoing answer; knows the contents thereof, and believes the same to be true.

JNO. W. HILL.

Subscribed and sworn to before me this 15th day of April, 1899.

[SEAL.] H. M. STEPHENS,
Notary Public in and for the State of Washington,
Residing at Spokane, Washington.

Due service of within answer by receipt of a true copy thereof admitted this 15th day of April, 1899.

VOORHEES & VOORHEES,
Attorneys for Plaintiffs.

(Endorsed:) Filed April 15, 1899. A. Reeves Ayres, clerk. By James O'Neill, deputy.

32 And afterwards, to wit, on the 24th day of April, 1899, there was duly filed in said court, in said cause, a motion to strike answer to amended complaint, in the words and figures following, to wit:

In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Washington, Eastern Division.

LOUISE H. ADAMS and FRANK H. ADAMS, Plaintiffs,
vs.
NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendant.

Motion to Strike Portions of Answer to Amended Complaint.

Come now the plaintiffs in the above-entitled action, by their attorneys, and move the court:

1. To strike from defendant's answer herein paragraph one (1) of defendant's first affirmative defense, on the ground that the matter therein contained is irrelevant and redundant.

2. To strike from defendant's answer herein paragraphs one (1), two (2), three (3), four (4), five (5), six (6), and seven of defendant's second affirmative defense, on the ground that the matter therein contained is irrelevant and redundant.

3. To strike from defendant's answer herein the following
33 matter from paragraph two (2) of defendant's second affirmative defense: "That deceased voluntarily assumed all risk and danger, if any there was, of placing himself in such position and of going over or upon the unvestibuled portion of said train at the said time and place;" on the ground that the same is a conclusion of law and irrelevant and redundant matter.

4. To strike from paragraph three (3) of the second affirmative defense of defendant's answer herein, the following: "That said deceased had for a long time immediately prior to his death been continuously employed as counsel and attorney for railroads and in and about the conduct and management of his business for such railroads and railway companies, he had frequent occasion to, and did very often, travel upon and over railroads in cars and trains of cars upon which there was no vestibuled car or cars and upon which the ends of the car, *i. e.*, the platform, were entirely open, uninclosed, unvestibuled, and unprotected, and that he did many times upon such unvestibuled and unprotected car and cars pass to and from the car and cars thereon and from one car to another at places much

more dangerous and where the curves were much shorter and sharper than at the point where the said accident or injury is alleged to have occurred upon the road of this defendant, and at times when such car or cars were going at a high rate of speed;" on the ground that the same is irrelevant and redundant matter.

5. To strike from paragraph four (4) of the second affirmative defense of defendant's answer herein, the following: "That
34 deceased had many times tri[illegible] cases and lawsuits for railroads and railway companies and in which the question of high and dangerous speed was involved and from his knowledge and the knowledge acquired from the trial of such cases, and from his constant connection and continued familiarity with railroads, railway companies, and their means and methods, he was able to, and often did, accurately judge the speed of trains and whether or not such speed was a high and dangerous rate of speed;" on the ground that the same is irrelevant and redundant matter.

6. To strike from paragraph five (5) of the second affirmative defense of defendant's answer herein, the following: "That in and upon said car designated as the 'smoking-car,' in which deceased took a seat upon entering said train of cars, there was and is commonly and generally, and upon said date, and trains there was, a person, designated as the 'news agent,' who had for sale in the said car, and at the said time and place, cigars of as good a brand and quality as any sold upon the said dining-car; that the said news agent was then and there upon the said train to the knowledge of said deceased, and that said news agent then and there had such cigars for sale to the knowledge of said deceased, and, therefore, there was no excuse or reason or occasion for the said deceased to go to or from the said dining-car as alleged in the amended complaint herein;" on the ground that the same is irrelevant and redundant matter.

7. To strike from said paragraph five (5) of the second
35 affirmative defense of defendant's answer herein, the balance of said paragraph, to wit: "And that if he did leave the said smoking-car and go to and return from the said dining-car as therein alleged, or at all, at the said time and place, or otherwise, he voluntarily assumed whatever risk or danger there was in so doing;" on the ground that the same is a conclusion of law and irrelevant and redundant matter.

8. To strike from defendant's said answer from paragraph seven (7) of the second affirmative defense thereof, the following: "That the train upon which deceased was riding at the time and place in question was the same kind of a train that defendant has run upon and over its said track ever since it has owned and operated the said line of railroad, to wit, since September 1st, 1896;" on the ground that the same is irrelevant and redundant.

9. To strike from defendant's said answer the balance of said paragraph seven (7) of the second affirmative defense thereof, to wit, the following: "And was the same kind of a train as is usually operated by other railroads, and that the cars thereon were, and all of them were, of the same kind, character, and description as are

usually operated by other railroads;" on the ground that the same is irrelevant and redundant.

VOORHEES & VOORHEES,
Attorneys for Plaintiffs.

Service of the within motion, by a true copy thereof, is hereby admitted, at Spokane, Washington, this 21st day of April, 1899.

STEPHENS & BUNN,
Attorneys for Defendant.

36 (Endorsed:) Filed April 24, 1899. In the United States circuit court. A. Reeves Ayres, clerk. By James O'Neill, deputy.

And afterwards, to wit, on the 18th day of August, 1899, there was duly filed in said court, in said cause, an order on motion to strike parts of answer to amended complaint, in the words and figures following, to wit:

In the Circuit Court of the United States, District of Washington, Eastern Division.

LOUISE H. ADAMS and FRANK H. ADAMS, Plaintiffs,
vs.
NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendant.

Order on Motion to Strike Parts of Answer to Amended Complaint.

And now, on this 16th day of August, 1899, on motion of Voorhees & Voorhees, attorneys for the plaintiffs:

It is ordered by the court that paragraphs numbered 3, 4, 5, 6, and 7 of the second affirmative defense in the defendant's answer, herein be, and the same are hereby, stricken out.

And it is further ordered by the court that the motion of
37 the plaintiffs of file herein to strike certain parts of said answer be, and the same is hereby, denied, except as to the parts of said answer stricken out by this order.

C. H. HANFORD, *Judge.*

Defendant excepts to the order of the court striking part of the answer herein, and its exception is allowed.

C. H. HANFORD, *Judge.*

The plaintiffs except to so much of the above order as denies the motion to strike the first affirmative defense and the first and second paragraphs of the second defense, and their exception is allowed.

C. H. HANFORD, *Judge.*

(Endorsed:) Filed August 18, 1899. A. Reeves Ayres, clerk. By James O'Neill, deputy.

38 And afterwards, to wit, on the 24th day of April, 1899, there was duly filed in said court, in said cause, a demurrer to answer to amended complaint, in the words and figures following, to wit:

In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Washington, Eastern Division.

LOUISE H. ADAMS and FRANK H. ADAMS, Plaintiffs,
vs.
NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendant.

Notice of Hearing of Demurrer.

To the above-named Northern Pacific Railway Company and to Messrs. Stephens & Bunn, its attorneys:

You will please take notice that the annexed demurrer will be called up for hearing on Monday, May 1st, 1899, at 10 o'clock a. m., or as soon thereafter as counsel can be heard.

April 21, 1899.

VOORHEES & VOORHEES,
Attorneys for Plaintiffs.

39 In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Washington, Eastern Division.

LOUISE H. ADAMS and FRANK H. ADAMS, Plaintiffs,
vs.
NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendant.

Demurrer to Answer to Amended Complaint.

Come now the plaintiffs in the above-entitled action, by their attorneys, and demur to the third affirmative answer and defense alleged in defendant's answer on the ground that it does not contain facts sufficient to constitute a defense.

VOORHEES & VOORHEES,
Attorneys for Plaintiffs.

I hereby certify that I am one of the counsel for plaintiffs in the above-entitled cause, and that the foregoing demurrer is, in my opinion, well founded in point of law.

REESE H. VOORHEES.

Received copy this April 21st, 1899.

STEPHENS & BUNN,
Attorneys for Defendant.

(Endorsed:) Filed April 24, 1899. In the United States circuit ourt. A. Reeves Ayres, clerk. By James O'Neill, deputy.

40 And afterwards, to wit, on the 7th day of August, 1899, there was duly filed in said court, in said cause, an opinion on demurrer to answer to amended complaint, in the words and figures following, to wit:

In the Circuit Court of the United States, District of Washington, Eastern Division.

LOUISE H. ADAMS and FRANK H. ADAMS, Plaintiffs,
vs.
NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendant.
} Filed August, 1899.

Opinion on Demurrer.

Voorhees & Voorhees for plaintiffs.
Stephens & Bunn for defendant.

HANFORD, *District Judge:*

This is an action by the widow and son of Jay H. Adams, deceased, to recover damages for the injury which they have suffered by his death. Mr. Adams fell, or was thrown, from the platform between cars of a train on which he was traveling as a passenger from Hope in the State of Idaho, to Spokane, sustaining injuries causing his death, and the complaint charges that the mishap was due to negligence on the part of the defendant in the im-
41 proper construction of the cars, and carelessness in operating the train. The defendant has filed an answer setting forth several grounds of defense in which it pleads as its third affirmative defense, "that the said Jay H. Adams paid defendant nothing for his transportation, but was being carried upon a free pass and that said Jay H. Adams, as a condition of such free carriage, had contracted with said defendant that said defendant should not be liable for any injury to the person of said Jay H. Adams, or for any loss or damage to his property, under any circumstances, whether of negligence of defendant's agents or otherwise;" and the case has been argued and submitted upon a demurrer to said defense.

The attorneys for the defendant in their argument upon the demurrer, make the following points:

"In the interpretation of a contract limiting liability of carrier, as to its validity and effect the '*lex loci contractus*' must control. * * *

"This rule certainly must prevail in a case where plaintiff depends entirely for a recovery solely upon the law of the State where such contract was made.

"The contract limiting the liability of the defendant railway company in this case was made, entered into and delivered within the State of Washington, the State where this suit was brought, and the law of the State of Washington is, that where the passenger is a

strictly gratuitous one, recovery cannot be had. (See Muldoon *vs.* Seattle City R'y Co., 7 Wash., 528–532; second appeal, same case, 10 Wash., 311–313.)"

Their effort appears to be to treat the case as if it were an
42 action to recover damages for breach of the contract by which the company undertook to carry Mr. Adams as a passenger on its train. But the plaintiffs do not base their demand upon any contract; on the contrary, they complain of a wrong resulting in an injury to them by deprivation of the support, protection, society, and comfort of their husband and father. Their case rests upon the same legal grounds as it would if Mr. Adams, without being a passenger on the defendant's train, and without holding any contract relation whatever with the defendant, had been killed by the wrongful act of the defendant. This being so, the question as to the validity of the contract under which the defendant claims exemption from liability is not material. If full effect be given to the exemption clause, it would only constitute a bar to the recovery of damages by Mr. Adams himself, or by his representatives for the benefit of his estate, but Mr. Adams is not a party to this action and the plaintiffs are not demanding the enforcement of any right of his, or any right which ever was subject to his control, or which could be extinguished or barred by any contract which he could make, without being specially authorized as their agent. Therefore, the decision of the supreme court of the State of Washington, in the case of Muldoon *vs.* Seattle City Railway Co., does not bind, or restrict the independence of this court in the determination of the rights of the parties in this case.

The statutes of Idaho are similar to the statutes of this State in
43 providing that when the death of a person is caused by the wrongful act or negligence of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, and in every such action the jury may give such damages, pecuniary or exemplary, as under all circumstances of the case may to them seem just. Under this law, the plaintiffs have a right of action to recover compensation for their own loss and they are not suing to enforce a right of the deceased to recover damages for the injury which he suffered, therefore the contract by which the deceased agreed to exempt the defendant from liability has no effect whatever upon their right of action. Not being parties to the contract they are not bound by it. In their brief, counsel for the defendant deny that there are any authorities supporting the proposition that, the right of action is an independent right; that is to say, not dependent upon the question whether or not the deceased, if he had survived the injury, could have sustained an action therefor, but I find no lack of authorities affirming that, "Lord Campbell's act and the statutes of most of the States create in favor of certain beneficiaries surviving the deceased an entirely new cause of action, distinct from and independent of any right of action the deceased may have had during his lifetime or could have had if he had survived the injury." (8 Am. & Eng.

Ency. of Law, 859; Martin *v.* Baltimore & Ohio Railroad, 151 U. S. 673; The Oregon, 73 Fed. Rep. 850.)

Some of the authorities cited give as a rule, that, "If the deceased in his lifetime did anything that would operate as a bar to the recovery by him of damages for personal injury, this will op-
44 erate equally as a bar in an action by his personal representatives for his death." I have no difficulty whatever in giving full assent to this rule, as stated, for I understand that the phrase "personal representative" of a deceased person means his executor, or administrator, who when suing in his representative capacity, stands in the place of the decedent, claiming such rights only as the law permits him to claim for the benefit of the decedent's estate. But it would be a perversion of the rule to apply it in a case like the one under consideration, in disregard of the elementary principles of the law of contracts. Such I consider would be the effect of permitting an agreement to which the plaintiffs have not assented to stand as a bar to a remedy for the injury which they allege.

Demurrer sustained.

C. H. HANFORD, *Judge.*

(Endorsed:) Filed August 7, 1899. A. Reeves Ayres, clerk. By James O'Neill, deputy.

45 And afterwards, to wit, on the 14th day of August, 1899, there was duly filed in said court, in said cause, an order sustaining demurrer to answer to amended complaint, in the words and figures following to wit:

In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Washington, Eastern Division.

LOUISE H. ADAMS and FRANK H. ADAMS, Plaintiffs,
vs.
NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendant.

Order Sustaining Demurrer.

The above-entitled cause coming on to be heard on the demurrer to the third affirmative answer and defense alleged in defendant's answer herein, heretofore filed by the plaintiffs herein, on consideration whereof, the court being fully advised in the premises:

It is ordered that the said demurrer be, and the same is hereby, sustained.

Dated the 12th day of August, 1899.

C. H. HANFORD, *Judge.*

To the ruling of the court sustaining said demurrer defendant excepts, and exception allowed.

C. H. HANFORD.

(Endorsed:) Filed August 14, 1899. A. Reeves Ayres, clerk. By James O'Neill, deputy.

46 And afterwards, to wit, on the 5th day of September, 1899, there was duly filed in said court, in said cause, a reply to affirmative matter in defendant's answer to amended complaint, in the words and figures following, to wit:

In the Circuit Court of the United States of America, Ninth Judicial Circuit, District of Washington, Eastern Division.

LOUISE H. ADAMS and FRANK H. ADAMS, Plaintiffs,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, Defendant.

Reply to Affirmative Matter in Defendant's Answer.

Come now the plaintiffs above-named, and replying to paragraph one (1), contained in the first and further affirmative answer and defense, and to paragraphs one (1), and two (2), contained in the second affirmative answer and defense of defendant, filed herein.

Deny each and every allegation, matter and thing contained in said paragraphs.

VOORHEES & VOORHEES,
Attorneys for Plaintiffs.

47. STATE OF WASHINGTON, } ss:
County of Spokane, }

Louise H. Adams, being first duly sworn, on oath states that she is one of the plaintiffs in the above-entitled cause; that she has heard read the foregoing reply and knows the contents thereof, and that the same is true as she verily believes.

LOUISE H. ADAMS.

Subscribed and sworn to before me this 31st day of August, 1899.

[SEAL.] C. S. VOORHEES,
Notary Public in and for the State of Washington, Residing at Spokane, Wash.

Received copy of within reply this September 5, '99.

STEPHENS & BUNN,
Attorneys for Defendant.

(Endorsed:) Filed September 5, 1899. In the United States circuit court. A. Reeves Ayres, clerk. By James O'Neill, deputy.

48 And afterwards, to wit, on the 11th day of April, 1900, there was duly filed in said court, in said cause, a second amended complaint, in the words and figures following, to wit:

UNITED STATES OF AMERICA:

In the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Eastern Division.

LOUISE H. ADAMS and FRANK H. ADAMS, Plaintiffs,
vs.
NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendant.

Second Amended Complaint.

Come now the plaintiffs, above-named, and for cause of action against the defendant company, above named, complain and allege:

1. That the plaintiffs, Louise H. Adams and Frank H. Adams, are, respectively, the widow and son, and the sole heirs at law, of Jay H. Adams, deceased; that said plaintiff, Louise H. Adams, and said deceased intermarried on the 27th day of December, 1870, and that said plaintiff, Frank H. Adams, is the sole surviving issue of said marriage.

49 2. That said plaintiffs at all the times hereinafter mentioned were, and now are, citizens of the State of Washington.

3. That during all the times hereinafter mentioned said defendant company was, and now is, a corporation, organized and doing *busing* business under the laws of the State of Wisconsin, and was, and now is, a citizen of the State of Wisconsin.

4. That during all the times hereinafter mentioned said defendant company was the owner of, and was operating, a certain railway known as the Northern Pacific railway, extending from Lake Superior, in the State of Wisconsin, to Puget sound, in the State of Washington, over and through the State of Idaho, together with the track, cars and locomotives thereunto belonging.

5. That on the 13th day of November, 1898, the said deceased, at the town of Hope, in the county of Kootenai, State of Idaho, entered a train of cars, belonging to said defendant company, for the purpose of being carried from said town of Hope to Spokane, in the State of Washington, which said train of cars was a regular passenger train, and was then and there being operated by said defendant company upon the said railway, so owned by it as aforesaid, as a common carrier of passengers upon and over said railway, and that said defendant company then and there accepted said deceased as a passenger thereon, for the purpose of safely carrying him from said town of Hope to said city of Spokane.

6. That on said day, while said deceased was being carried thereon, as aforesaid, the said defendant company operated,
50 and caused to be operated, its said train of cars so negligently and carelessly as to cause the death of said Jay H. Adams.

7. That on said day, and for a long time prior thereto, it was, and had been, the custom, of said defendant company, generally known and long established, to have attached to its trains, operated upon

said railway, for the carriage of passengers, for the comfort and convenience of said passengers, a car in which said passengers might secure their meals, cigars, and such other things as might contribute to their comfort and convenience, while said train was in motion, which said car was commonly known as a dining-car, and that on said day such dining-car was attached to said train of cars, and that the said defendant company extended to all its passengers, including said deceased, an invitation to visit said dining-car whenever it suited their comfort or convenience so to do.

8. That there were, prior to and at the time aforesaid, generally known and in known practical use by railway passenger carriers on cars, for the protection of passengers while passing to and from dining-cars and other cars, while the trains formed by said cars were in motion, appliances commonly known as and constituting the vestibuling of cars, which consisted of enclosing and making a continuous enclosed passage of the abutting platforms of connecting cars, and which increased the safety of such passengers by rendering it impossible for such passengers while passing to and from cars as aforesaid, to fall or be thrown from platforms while passing
51 over them where said appliances were in use and operation, and that said appliances were the best in practical known use for the protection of passengers while passing to and from dining-cars and other cars while the trains formed by said cars were in motion.

9. That on said day, and for a long time prior thereto, the said defendant company had caused it to be generally known to the public and to said Jay H. Adams, by advertisements in divers newspapers in the city of Spokane, that its trains for the carriage of passengers, and all the platforms of the cars thereof, were fully equipped with the said appliances in the preceding paragraph hereof mentioned and described, with special reference in connection therewith to the safety of said trains and with special reference in connection therewith to the safety in using the dining-car in said trains by the passengers on said trains.

10. That on said day the train of cars aforesaid was vestibuled, as aforesaid, except as hereinafter specifically set forth, and that, upon the said train of cars in which said deceased was so traveling at the time of his death, as hereinafter mentioned, there was maintained upon said train, by said defendant company, for the accommodation and convenience of the passengers on said train, free and uninterrupted access through said vestibules for passing through the same from car to car, and across and over all the platforms of the cars attached to said train.

11. That on said day the said deceased took a seat in the car
52 on said train known as the smoking-car, the said smoking-car being located, in said train, some distance in front of the said dining-car, and that, in said train, the said defendant company had negligently and carelessly caused a car to be placed, and permitted the same to be and remain, in said train, the two platforms of which said car were not vestibuled nor guarded in any manner whatever.

12. That on said day, and a very few moments after said train left the said town of Hope, and while said train was running toward the next station on said road, the said deceased left said smoking-car to visit said dining-car for the purpose of purchasing cigars, which were kept, in said car, for sale to the passengers on said trains of said defendant company.

13. That having purchased said cigars the said deceased left said dining-car for the purpose of returning to said smoking-car, and that, while passing over one of said unguarded and unvestibuled platforms, through and because of the negligence of defendant company in leaving the platforms of said car in said train unvestibuled and unguarded, as aforesaid, by the movements of said train, said deceased was thrown from said train and killed.

14. That said defendant company carelessly and negligently left an opening at the side of the platform of one of the cars on said train, used for entrance and exit, unguarded while said train was in motion, and that while passing over said platform, as aforesaid, through and because of defendant company's failure to guard
53 said opening, deceased was precipitated through said unguarded opening by the movements of said train and killed.

15. That at the time and place of said injury to deceased said defendant company was run-ing its said train at a high and dangerous rate of speed, and that, through and because of the negligence of said defendant company in so running its said train at a high and dangerous rate of speed, said deceased was thrown from said train and killed.

16. That at a short distance from the said town of Hope there was a sharp curve in said defendant company's track over which said train had to pass, and that said defendant company ran its train around said sharp curve at a high and dangerous rate of speed, and that, through and because of defendant company's negligence in so running its said train around said curve, deceased was, at said curve, thrown from said train and killed.

17. That by reason of the negligence and carelessness of the defendant company, as aforesaid, plaintiffs were compelled to and did, expend the sum of four hundred and twenty-four ($424) dollars as funeral expenses incurred in the interment of said deceased.

18. That at the time of the death of the said Jay H. Adams, as aforesaid, and previous thereto, the said Jay H. Adams was possessed of good health, a great capacity for labor, was of industrious habits and of good ability as a manager of property and affairs; was a lawyer by profession, of skill and learning, had a large business and was able to earn and was earning large sums of money in such
54 profession, and was a prudent, kind, and affectionate husband and father and that the plaintiffs were dependent on him, the said Jay H. Adams, for support and maintenance.

That the said plaintiff, Frank H. Adams, at the time of the death of the said Jay H. Adams, as aforesaid, was being educated by the said Jay H. Adams, and was in attendance at the Stanford university in the State of California for that purpose, and would have been there kept, maintained, and supported for about two years

longer and until the completion of the course of study pursued at said university, and would have been supplied in all things incident thereto by the said Jay H. Adams, except for the death of the said Jay H. Adams; that after the completion of the education of the said Frank H. Adams, at said university, it was the intention of the said Jay H. Adams to send the plaintiff, Frank H. Adams, to the law department of Harvard college in the State of Massachusetts, and there to pay for, secure, and give to the said Frank H. Adams a complete education in the profession of the law, and to support and maintain the said Frank H. Adams while securing such profession, and to supply him with all things incident thereto, and that the said Jay H. Adams would have so done, except for the death of the said Jay H. Adams, as aforesaid. That after the acquisition of the said education in the profession of the law, as aforesaid, by the plaintiff, Frank H. Adams, it was the intention of the said Jay H. Adams to take the said Frank H. Adams into the law office of the said Jay H. Adams, and to give to the said Frank H. Adams
55 the great benefit of the wide experience and learning of the said Jay H. Adams in the law, in further instruction and particularly in instruction and teaching in the actual practice of the law, and to counsel and advise him, the said Frank H. Adams, in starting his professional career, and to support and maintain the said Frank H. Adams in all things until he, the said Frank H. Adams, became self-supporting in the practice of the law, the said Frank H. Adams being without means of support, and finally to take the said Frank H. Adams into partnership in the practice of the law with the said Jay H. Adams, all of which matters and things the said Jay H. Adams would have done except for the death, as aforesaid, of the said Jay H. Adams. That by reason of the death of the said Jay H. Adams, through the negligence and carelessness of the defendant company, as aforesaid, the said plaintiff, Frank H. Adams, has lost all the said above described benefits and advantages and the earnings and accumulations of the said Jay H. Adams, and the plaintiff, Louise H. Adams, has lost the earnings and accumulations of the said Jay H. Adams, and his foresight and management, and has also been deprived of his support and maintenance, and of his services, attention, and care, advice, and counsel, and the said plaintiffs have been and are damaged in the sum of one hundred thousand dollars ($100,000).

Wherefore, plaintiffs pray judgment against defendant company in the sum of one hundred thousand four hundred and twenty-four dollars (100,424), and for their costs and disbursements herein.

VOORHEES & VOORHEES,
Attorneys for Plaintiffs.

56 STATE OF WASHINGTON, } ss:
County of Spokane, }

Louise H. Adams, being first duly sworn, on oath states that she is one of the plaintiffs in the above-entitled cause; that she has heard read the foregoing second amended complaint and knows the contents thereof, and that the same is true, as she verily believes.

LOUISE H. ADAMS.

Subscribed and sworn to before me this 10th day of April, 1900.
[SEAL.] C. S. VOORHEES,
Notary Public in and for the State of Washington,
Residing at the City of Spokane, Wash.

(Endorsed:) Filed April 11, 1900. A. Reeves Ayres, clerk. By James O'Neill, deputy.

And afterwards, to wit, on the 11th day of April, 1900, there was duly filed in said court, in said cause, an amended answer to second amended complaint, in the words and figures following, to wit:

57 UNITED STATES OF AMERICA:

In the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Eastern Division.

LOUISE H. ADAMS and FRANK H. ADAMS, Plaintiffs,
vs.
NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendant.

Amended Answer to Second Amended Complaint.

Comes now the defendant, The Northern Pacific Railway Company, and for amended answer to the second amended complaint of plaintiffs alleges:

1. Said defendant admits each and every allegation contained in the first, second, third, fourth, and twelfth paragraphs of said second amended complaint, and each of them.

2. Said defendant denies each and every allegation, matter, and thing contained in the sixth, ninth, tenth, fourteenth, and fifteenth paragraphs of said second amended complaint and each of them.

3. Answering the fifth paragraph of said second amended complaint, the defendant admits that on the 13th day of November, 1898, the said deceased, Jay H. Adams, at the town of Hope, in Kootenai county, State of Idaho, entered a train of cars belonging to said defendant company, for the purpose of being carried
58 from said town of Hope to Spokane, in the State of Washington, which said train of cars this defendant admits was a regular passenger train, and was then and there being operated by defendant upon said railway, as a common carrier of passengers. But defendant denies that it then and there, or at all, accepted said deceased, Jay H. Adams, as a passenger thereon for the purpose of safely carrying him from said town of Hope to the said city of Spokane, and denies that it accepted the said deceased as a passenger for any purpose, or at all.

4. Answering the seventh paragraph of said second amended complaint, defendant admits that on the day mentioned and referred to in paragraph number seven of said second amended complaint it was and had been the custom of the defendant company to have attached to its train operated upon said ra-lway for the car-

riage of passengers, and for the comfort and convenience of said passengers, a car commonly known as a dining-car, in which passengers might secure meals and cigars; and admits that on said day such car, known as a dining-car, was attached to the said train; but defendant denies each and every other allegation, matter and thing contained in said paragraph numbered seven of said second amended complaint; and defendant specifically denies that it extended to all or any of its passengers, or to the deceased, or to any one, an invitation to visit said dining-car whenever it suited their convenience or comfort so to do. And defendant alleges in this behalf that the cigars kept and sold, or the cigars which passengers might secure, in the said dining-car, were kept only for and sold only to such
59 passengers as had entered said car upon the invitation of said defendant for the purpose of, and at the proper time for, securing meals, and further alleges in this behalf that the only invitation extended to its passengers, or to any passenger, or to the deceased, to visit said dining-car, was for the purpose of procuring meals, and then only when the cars or the train were or was at rest or standing still. And defendant denies that it extended to its passengers, or to any passenger, or to the said deceased, an invitation to visit said dining-car at any time except when the cars, or the train, were or was standing still or at rest.

5. Answering the eighth paragraph of said amended complaint, the defendant admits that there were prior to and at the time mentioned in said second amended complaint generally known and in practical use by railway passenger carriers on such cars for the convenience and comfort of passengers while passing to and from dining-cars and other cars, appliances commonly known as and constituting the vestibuling of cars, which consisted of enclosing and making a continuous enclosed passage of abutting platforms of connecting cars, and which increased the comfort and convenience of passengers while passing to and from cars, and that said appliances were the best in practical known use for such purposes; and defendant denies each and every other allegation in said paragraph contained.

6. Answering the eleventh paragraph of said second amended complaint, defendant admits that on the day mentioned in
60 said paragraph the deceased, Jay H. Adams, took a seat in a car on said train known as the smoking-car, and that said smoking-car was located on said train some distance in front of said dining-car; and admits that a car was placed and permitted to be and remain in said train, the platforms of which said car were not vestibuled; but defendant denies each and every other allegation, matter and thing contained in said paragraph numbered eleven of said second amended complaint, and especially denies that defendant negligently or carelessly caused said unvestibuled car to be placed or permitted to be or remain on said train; and denies that the ends, or either end, of said car was unguarded in any manner whatever, or was in any manner, or otherwise, or at all, unguarded.

7. Answering the thirteenth paragraph of said second amended complaint, the defendant admits that the deceased, having purchased

a cigar, left the dining-car to return to the smoking-car in said train, but denies each and every other allegation, matter, and thing contained in said paragraph thirteen of said second amended complaint.

8. Answering the sixteenth paragraph of said second amended complaint, the defendant admits that at a short distance from the town of Hope there was a curve in the defendant company's track over which said train had to run; but defendant denies each and every other allegation, matter, and thing contained in said paragraph numbered sixteen of said second amended complaint; and especially denies that it ran said train around said curve, or around any sharp curve, or any curve, at a high or dangerous rate of speed.

61 9. Answering the seventeenth paragraph of said second amended complaint, the defendant denies that by reason of any negligence or carelessness of the defendant company, or of any of its officers, agents or employees, the plaintiffs, or either of them, were compelled to or did expend the sum of four hundred and twenty-four dollars as funeral expenses incurred in the interment of the said deceased, or any sum or amount whatever. And said defendant denies each and every allegation in said paragraph contained.

10. Answering the eighteenth paragraph of said second amended complaint, the defendant denies each and every allegation in said paragraph contained; and denies that by reason of any negligence or carelessness of the defendant, or of any officers, or officer, agents or agent, employees or employee of said defendant, the plaintiffs, or either of them, have, or has, lost any benefit or advantage, or any earnings or accumulations of said Jay H. Adams, or any of his foresight or management, or been deprived of his support or maintenance, or of any of his services, attention, care, advice or counsel; and denies that the plaintiffs, or either of them, have been, or has been, damaged in the sum of one hundred thousand four hundred and twenty-four dollars, or in any sum or amount whatever, or in any manner or form whatever, or injured or damaged at all.

I.

Defendant, further answering the second amended complaint of plaintiffs herein, and for a first affirmative answer and defense thereto alleges:

62 1. That the death of the deceased, Jay H. Adams, mentioned and referred to in said second amended complaint, and any damage or damages, injury or injuries, sustained by the plaintiffs, or either of them, thereby, if any injury or damage has been so sustained was caused by the carelessness and negligence of the deceased, and by and through his own careless and negligent acts and conduct; and that by his own carelessness and negligence at the time and place in said second amended complaint set forth and referred to, the said deceased, Jay H. Adams, contributed to and caused his own death; and that the death of the said Jay H. Adams at the time and place mentioned in said second amended complaint was caused without any fault or negligence or any want of care, skill, or

diligence upon the part of this defendant, or upon the part of any of its officers, agents, servants or employees or either or any of them; and that the negligence and carelessness of said deceased, Jay H. Adams, contributed to his death, and were the proximate cause thereof.

II.

Defendant, further answering the second amended complaint of the plaintiffs herein, and as a second and further affirmative answer and defense thereto, alleges:

1. That the deceased, Jay H. Adams, at the time he came to his death, and at the time he entered upon the defendant's train at the town of Hope, in the State of Idaho, and at all times thereafter until his death, was not a passenger for hire at any time upon the defendant's said train, or in the defendant's car or cars; and
63 he did not at said time and place, or at any time or place, pay any fare, or expect or intend to pay any fare, to ride upon the defendant's train from said town of Hope to the city of Spokane, or upon any part or portion of said journey, and did not in fact pay any such fare, but at the time and place mentioned in said second amended complaint, and during all said times, said decedent was traveling upon, and wholly by virtue of, a free and gratuitous pass, without any charge or consideration whatever, the terms and conditions upon which said decedent received and used said pass and rode upon defendant's said train being endorsed upon said pass, annexed thereon, and being a part thereof, printed upon the back thereof; and each and every term thereof was accepted, agreed to and signed by said deceased, and said contract and agreement duly executed by said deceased before boarding said train; and said deceased was fully cognizant and aware of all the terms and conditions thereof, and was allowed and permitted by the defendant to ride upon said train from said town of Hope, in the State of Idaho, to said city of Spokane, in the State of Washington, wholly and solely by reason of the execution of said contract by said deceased, and for no other reason, and upon no other terms or conditions whatever, as said decedent at the time well knew, and in all things understood, agreed to, and was willing to be bound thereby, which said contract and agreement, and the conditions thereof, were in words and figures as follows, to wit:

64 *Conditions.*

"This free ticket is not transferable, and, if presented by another person than the individual named thereon, or if any alteration, addition or erasure is made upon it, it is forfeited, and the conductor will take it up and collect full fare.

"The person accepting this free ticket agrees that the Northern Pacific Railway Company shall not be liable, under any circumstances, whether of negligence of agents or otherwise, for any injury to the person, or for any loss or damage to the property, of the passenger using the same."

"I accept the above conditions.

"JAY H. ADAMS.

"This pass will not be honored unless signed in ink by the person for whom issued."

2. That the said contract and agreement was made and entered into between said decedent and the defendant at the city of Spokane, in the State of Washington, and was then and there executed by the said Jay H. Adams, who then and there wrote his signature to said contract in ink, as required by the terms thereof; and thereafter said Jay H. Adams, at all times, and many times, while passing over and upon the defendant's railway line, used said pass and was transported over the *lien* of said road solely by reason of said contract, and without any charge or payment of fare in any manner or form whatever, and was at all said times, and at the time of his death, purely a gratuitous traveler and licensee,
65 riding upon said pass, and bound by the terms thereof and conditions therein; and said defendant owed the said decedent no duty whatever as a common carrier toward a passenger for hire, and could not be, and is not, liable for any loss or damage that may have occurred, or that has occurred, to the plaintiffs, or to either of them, by reason of the death of the said Jay H. Adams at the time and place and the circumstances under which the said Jay H. Adams came to his death.

Wherefore, defendant prays that plaintiffs have and take nothing by their action herein; that it go hence without day; and that defendant have and recover of and from plaintiffs its costs and disbursements herein.

WILL H. THOMPSON AND
STEPHENS & BUNN,
Attorneys for Defendant.

STATE OF WASHINGTON, }
County of Spokane, } *ss:*

Jno. W. Hill, being first duly sworn, upon oath deposes and says that he is general agent of and for The Northern Pacific Railway Company, defendant in the above-entitled action, located at and residing in Spokane, Spokane county, Washington, and makes this affidavit of verification for and on behalf of said defendant; that he has read the foregoing amended answer to second amended complaint and knows the contents thereof; and that the same is true, as he verily believes.

JNO. W. HILL.

66 Subscribed and sworn to before me this 11th day of April, 1900.

[SEAL.]

E. T. WHITE,
Notary Public in and for the State of Washington,
Residing at Spokane, Washington.

Received a copy hereof the 11th day of April, 1900.

VOORHEES & VOORHEES,
Attorneys for Plaintiffs.

(Endorsed:) Filed April 11th, 1900. A. Reeves Ayres, clerk.

5—466

And afterwards, to wit, on the 12th day of April, 1900, there was duly filed in said court in said cause, a motion to strike amended answer to second amended complaint, in the words and figures following, to wit:

In the Circuit Court of the United States of America, Ninth Judicial Circuit, District of Washington, Eastern Division.

LOUISE H. ADAMS and FRANK H. ADAMS, Plaintiffs,
vs.
NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendant.

Motion to Strike Portions of Amended Answer to Second Amended Complaint.

Come now the plaintiffs in the above-entitled action, by their attorneys, and move this honorable court:

67 1st. To strike from defendant's amended answer to plaintiff's second amended complaint, and from the second paragraph of the second affirmative answer and defense thereof the following: "And thereafter said Jay H. Adams at all times and many times while passing over and upon the defendant's railway line used said pass, and was transported over the line of said road solely by reason of said contract and without any charge or payment of fare in any manner of form whatever;" and the following words, "at all said times," in line 10 of said second paragraph, for the reason that the same is irrelevant and immaterial matter.

2d. To strike from said paragraph two of the second and further affirmative answer and defense of defendant's said second amended answer, the following: "And bound by the terms thereof and conditions therein; and said defendant owed the said decedent no duty whatever as a common carrier towards a passenger for hire, and could not be and is not liable for any loss or damage that may have occurred or that has occurred to the plaintiffs, or to either of them, by reason of the death of the said Jay H. Adams, at the time and place and the circumstances under which the said Jay H. Adams came to his death:" for the reason that said matter constitutes and is conclusions of law only.

3d. To strike paragraph one of the first affirmative answer and defense of defendant's amended answer to plaintiffs' second amended complaint, on the ground that the matter therein contained is irrelevant and redundant.

VOORHEES & VOORHEES,
Attorneys for Plaintiffs.

68 Service accepted April 12, 1900.
STEPHENS & BUNN,
W. H. THOMPSON,
Attorneys for Defendant.

(Endorsed:) Filed April 12, 1900. A. Reeves Ayres, clerk. By James O'Neill, deputy.

And afterwards, to wit, on the 12th day of April, 1900, there was duly filed in said court, in said cause, an order overruling motion of plaintiffs to strike certain portions of the first and second further affirmative answers and defenses from the amended answer of defendants to the second amended complaint of plaintiffs, in the words and figures following, to wit:

In the Circuit Court of the United States of America, Ninth Judicial *Circuit, District of Washington, Eastern Division.*

LOUISE H. ADAMS and FRANK H. Adams, Plaintiffs, vs. NORTHERN PACIFIC RAILWAY Company (a Corporation), Defendant.	Order Overruling Motion of Plaintiffs to Strike Certain Portions of the First and Second Further Affirmative Answers and Defenses from the Amended Answer of Defendants to the Second Amended Complaint of Plaintiffs.

Order Overruling Motion to Strike, etc.

The above-entitled matter coming on to be heard upon the motion of plaintiffs to strike the first and portions of the second
69 further affirmative answer and defense from the amended answer of defendant to the second amended complaint of plaintiffs, the plaintiffs appearing by their attorneys, Voorhees & Voorhees, and the defendant appearing by its attorneys, Stephens & Bunn and Will H. Thompson, and after hearing argument of counsel and the court being fully advised in the premises—

It is ordered that said motion be, and the same is, hereby denied. Plaintiffs except and exception allowed.

Done in open court this 12th day of April, A. D. 1900.

C. H. HANFORD, *Judge.*

(Endorsed:) Filed April 12, 1900. A. Reeves Ayres, clerk. By James O'Neill, deputy.

70 And afterwards, to wit, on the 12th day of April, 1900, there was duly filed in said court, in said cause, a demurrer to second affirmative answer of defendant's amended answer to plaintiffs' second amended complaint, in the words and figures following, to wit:

In the Circuit Court of the United States of America, Ninth Judicial Circuit, District of Washington, Eastern Division.

LOUISE H. ADAMS and FRANK H. ADAMS, Plaintiffs,
vs.
NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendant.

Demurrer to Second Affirmative Defense, etc.

Come now the plaintiffs, above named, by their attorneys, and demur to the second and further affirmative answer and defense of defendant's amended answer to plaintiffs' second amended complaint, on the ground that it does not state facts sufficient to constitute a defense.

VOORHEES & VOORHEES,
Attorneys for Plaintiffs.

I hereby certify that I am one of the counsel for plaintiffs in the above-entitled cause, and that the foregoing demurrer is, in my opinion, well founded in point of law.

REESE H. VOORHEES.

71 Service of copy accepted April 12, 1900.
STEPHENS & BUNN,
Attorneys for Defendant.

(Endorsed:) Filed April 12th, 1900. A. Reeves Ayres, clerk.

And afterwards, to wit, on the 12th day of April, 1900, there was duly filed in said court, in said cause, an order sustaining demurrer to the second further and affirmative defense set forth in the amended answer of defendant to the second amended complaint of plaintiffs filed herein, in the words and figures following, to wit:

In the Circuit Court of the United States of America, Ninth Judicial Circuit, District of Washington, Eastern Division.

LOUISE H. ADAMS and FRANK H. ADAMS, Plaintiffs,
vs.
NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendant.

Order Sustaining Demurrer to the Second Further and Affirmative Defense Set Forth in the Amended Answer of Defendant to the Second Amended Complaint of Plaintiffs Filed Herein.

Order Sustaining Demurrer to Second Affirmative Defense, Etc.

The above-entitled matter coming on to be heard upon the demurrer of plaintiffs to the second further and affirmative an-
72 swer and defense set forth in the amended answer of defendant to the second amended complaint of plaintiffs, the plain-

tiffs appearing by their counsel, Voorhees & Voorhees, and the defendant by its counsel, Stephens & Bunn and Will H. Thompson, and after hearing argument of counsel, and the court being fully advised in the premises—

It is ordered that the said demurrer be, and the same is, hereby sustained.

Defendant excepts and exception is allowed.

Done in open court this 12th day of April, A. D. 1900.

C. H. HANFORD, *Judge.*

(Endorsed:) Filed April 12, 1900. A. Reeves Ayres, clerk. By James O'Neill, deputy.

And afterwards, to wit, on the 12th day of April, 1900, there was duly filed in said court, in said cause, a reply to affirmative matter in defendant's amended answer to second amended complaint of plaintiffs, in the words and figures following, to wit:

73 In the Circuit Court of the United States of America, Ninth Judicial Circuit, District of Washington, Eastern Division.

LOUISE H. ADAMS and FRANK H. ADAMS, Plaintiffs,
vs.
NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendant.

Reply to Affirmative Matter in Defendant's Amended Answer to Second Amended Complaint of Plaintiffs.

Come now the plaintiffs in the above-entitled action, and replying to paragraph one of the first affirmative answer and defense in defendant's amended answer to plaintiff's second amended complaint herein, deny each and every allegation, matter, and thing contained in said paragraph.

VOORHEES & VOORHEES,
Attorneys for Plaintiffs.

STATE OF WASHINGTON, } ss:
County of Spokane, }

Louise H. Adams, being first duly sworn, on oath states that she is one of the plaintiffs in the above-entitled cause; that she has heard read the foregoing reply and knows the contents thereof, and that the same is true, as she verily believes.

LOUISE H. ADAMS.

74 Subscribed and sworn to before me this 12th day of April, 1900.

[SEAL.]

C. S. VOORHEES,
Notary Public for the State of Washington,
Residing at Spokane, Wash.

Service of copy accepted this 12th day of April.
STEPHENS & BUNN,
Attorneys for Defendant.

(Endorsed:) Filed April 12th, 1900. A. Reeves Ayres, clerk.

And afterwards, to wit, on Wednesday, the 5th day of December, 1900, the same being the 27th judicial day of the regular September term of said court—present, the Honorable Cornelius H. Hanford, United States district judge, presiding—the following proceedings were had in said cause, to wit:

LOUISE H. ADAMS and FRANK H. ADAMS, Plaintiffs,
vs.
NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendant.

Trial.

And now again, on this day, the trial of this cause was resumed in the examination of witnesses and argument of counsel until its close.

75 Whereupon the jury were charged by the court, and retired to deliberate upon its verdict.

And thereafter, after due deliberation, the jury, at 10.45 o'clock p. m., returned into open court, and returned a verdict in the words and figures following, to wit:

In the United States Circuit Court for the District of Washington, Eastern Division.

LOUISE H. ADAMS and FRANK H. ADAMS, Plaintiffs,
vs.
NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendant.

Verdict.

We, the jury impaneled in the above-entitled case, find for the plaintiffs, and award as damages—

To Louise H. Adams..... $12,000.00
To Frank H. Adams..... 2,000.00

A. G. ANSELL, *Foreman.*

(Endorsed:) Filed December 5, A. D. 1900. A. Reeves Ayres, clerk. By James O'Neill, deputy.

76 And afterwards, to wit, on the 13th day of December, 1900, there was duly filed in said court in this cause, a motion to set aside verdict for a new trial, in the words and figures as follows, to wit:

In the Circuit Court of the United States in and for the District of Washington, Eastern Division.

LOUISE H. ADAMS and FRANK H. ADAMS, Plaintiffs,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, Defendant.

Motion to Set Aside Verdict and for New Trial.

Comes now the defendant, Northern Pacific Railway Company, and moves the court to set aside the verdict rendered and filed in the above-entitled cause, and to grant a new trial to the defendant upon the plaintiffs' cause of action, upon the following grounds, and for the following reasons, to wit:

1. Insufficiency of the evidence to justify the verdict of the jury.
2. That the verdict of the jury is against the law.
3. That the verdict of the jury is against the evidence.
4. That the verdict of the jury is contrary to law and is not supported by sufficient evidence.

77 5. On account of errors of law occurring at the trial and excepted to at the time by the defendant.

6. Error of the court in excluding evidence offered by the defendant to wit: The pass upon which Jay H. Adams, the decedent, was riding at the time he came to his death on the 13th day of November 1898; and also in excluding the contract and agreement endorsed upon the back of said pass and executed and signed by said Jay H. Adams.
7. Because the court erred in not giving to the jury the first instruction asked by the defendant, to direct a verdict of said jury in favor of the said defendant.
8. Because the court erred in giving instructions excepted to by the defendant at the time.
9. Because the court erred in not giving, and in refusing to give instructions requested by the defendant.

This motion is made and based upon the minutes of the court by which it is meant to include notes of the evidence taken by the reporters, and all the testimony in the case, and all rulings made and excepted to in the progress of the trial, and all instructions given to which the defendant excepted, and the failure to give instructions offered and requested by the defendant.

STEPHENS & BUNN,
Attorneys for Defendant.

WILL H. THOMPSON, *Of Counsel.*

78 STATE OF WASHINGTON, } ss:
County of Spokane,

E. T. White, being first duly sworn, on oath states: I am over twenty-one years of age and competent to be a witness in the within

entitled action, and not the plaintiff therein; that on the 12th day of December, 1900, in the county of Spokane and State of Washington I personally served the foregoing motion on Voorhees & Voorhees, attorneys for plaintiffs, by then and there personally delivering a true copy of said motion to Reese H. Voorhees, one of plaintiff's attorneys in said action, and a member of said Voorhees & Voorhees.

E. T. WHITE.

Subscribed and sworn to before me this 12th day of December, 1900.

[SEAL.] H. M. STEPHENS,
Notary Public in and for the State of Washington, Residing at Spokane.

(Endorsed:) Filed December 13, 1900. A. Reeves Ayres, clerk By James O'Neill, deputy.

And afterwards, to wit, on the 14th day of December, 1900, there was duly filed in said court, in this cause, an order denying motion for new trial, in the words and figures as follows, to wit:

79 UNITED STATES OF AMERICA:

In the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Eastern Division.

LOUISE H. ADAMS and FRANK H. ADAMS, Plaintiffs,
vs.
NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendant. } No. 670.

Order Denying Motion for New Trial.

The above-entitled cause coming on this day to be heard upon the motion of defendant for a new trial, and the court having heard arguments by counsel for the plaintiffs and defendant, and being fully advised in the premises upon consideration—

It is ordered that said motion be, and the same is, hereby denied.

To which order of the court the defendant, by their counsel, except, and the exception is allowed.

Done in open court this 14th day of December, A. D. 1900.

C. H. HANFORD, *Judge.*

(Endorsed:) Filed December 14, 1900. A. Reeves Ayres, clerk. By James O'Neill, deputy.

80 And afterwards, to wit, on the 14th day of December, 1900, there was issued out of said court, in this cause, a judgment on the verdict, in the words and figures as follows, to wit:

UNITED STATES OF AMERICA:

In the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Eastern Division.

LOUISE H. ADAMS and FRANK H. ADAMS, Plaintiffs,
vs.
NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendant. } No. 670.

Judgment on the Verdict.

Come now the parties to the above-entitled cause, by counsel, the plaintiffs herein by Voorhees & Voorhees, their attorneys, and the defendants herein by Stephens & Bunn and Will H. Thompson, its attorneys, and upon plaintiffs' motion—

It is ordered that judgment be entered upon the verdict heretofore, to wit, on the 5th day of December, 1900, rendered in favor of plaintiff, Louise H. Adams and against said defendant, for the sum of twelve thousand ($12,000) dollars, and in favor of plaintiff, Frank H. Adams, and against said defendant, for the sum of two thousand ($2,000) dollars.

81 It is therefore considered, ordered, and adjudged that the plaintiff, Louise H. Adams, do have and recover of and from the defendant, Northern Pacific Railway Company, a corporation, the sum of twelve thousand ($12,000) dollars, with interest thereon at the rate of six (6) per cent. per annum, from the date hereof, until paid, and that the plaintiff, Frank H. Adams, do have and recover of and from the defendant Northern Pacific Railway Company, a corporation, the sum of two thousand ($2,000) dollars, with interest thereon at the rate of six (6) per cent. per annum from the date hereof until paid, together with the costs and disbursements of said plaintiffs herein laid out, and expended taxed at — dollars.

Done in open court this 14th day of December, A. D. 1900.

C. H. HANFORD, *Judge.*

(Endorsed:) Filed December 14, 1900. A. Reeves Ayres, clerk. By James O'Neill, deputy.

82 And afterwards, to wit, on the 14th day of December, 1900, there was duly filed in said court, in this cause, an order extending time to file bill of exceptions, in the words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Washington, for the Eastern Division.

LOUISE H. ADAMS ET AL., Plaintiffs,
vs.
THE NORTHERN PACIFIC RAILWAY CO., Defendant.

Order Extending Time to File Bill of Exceptions.

Upon the application of defendant herein, and the court being advised in the premises, the time in which said defendant have to prepare, present, file, and serve its bill of exceptions herein shall be, and the same is hereby, extended to sixty days from the date of entry of judgment herein; and execution herein is stayed until proper bond be given on writ of error.

Done in open court this 14th day of December, 1900.

C. H. HANFORD, *Judge.*

(Endorsed:) Filed December 14, 1900. A. Reeves Ayres, clerk. By James O'Neill, deputy.

83 In the Circuit Court of the United States in and for the Ninth Judicial Circuit, District of Washington, Eastern Division.

LOUISE H. ADAMS and FRANK H. ADAMS, Plaintiffs,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, Defendant.

Bill of Exceptions.

Be it remembered, that on the 28th day of November, 1900, at ten o'clock a. m., the above-entitled cause came on for trial in the above court, the Hon. C. H. Hanford presiding, the plaintiffs appearing by Messrs. Voorhees & Voorhees, and the defendant appearing by Messrs. Stephens and Bunn, by John M. Bunn, Esq. and Will H. Thompson, Esq., of counsel; and thereupon the following proceedings were had.

The respective parties announced they were ready for trial, and the clerk proceeded to call the roll of jurors present, and there being an insufficient number of jurors present, the court was adjourned until November 30, 1900, at ten o'clock a. m.

Thereafter, to wit, on November 30, 1900, at ten o'clock a. m.,
84 the court met pursuant to such adjournment and a jury was impaneled and sworn. The respective parties appeared as above stated, and announced ready for trial.

Thereupon plaintiffs' counsel made his opening statement to the jury, and thereupon the plaintiffs introduced the following testimony relating to their cause of action:

Mr. C. S. Voorhees, counsel for the plaintiffs, read to the jury a

stipulation as to the makeup of the train in question. Said stipulation was introduced in evidence, and marked Exhibit "A," and is as follows:

It is hereby stipulated and agreed by and between Voorhees & Voorhees, attorneys for plaintiffs, and Stephens & Bunn, attorneys for defendant, in the above-entitled action, that train number "one," west-bound, operated by defendant, on November 13th, 1898, upon which Jay H. Adams, the husband and father of the plaintiffs above named, respectively, left the town of Hope, Idaho, for Spokane, Washington contained a car known as a tourist sleeping-car placed in said train immediately forward of and adjoining, the car in said train known as a dining-car, the forward and rear platforms of which said tourist sleeping-car were unvestibuled, and that the sides of said platforms, where the steps leading thereto were attached, were open, and such open spaces at said sides were for the passage of people to and from said platforms and said train, and were not closed or obstructed in any manner, and that said rear platform of said tourist sleeping-car closely joined at the end of said platform the end of the forward platform of the said dining-car, which said forward platform of said dining-car was vestibuled and enclosed at the sides and at the end, except for an open-
85 ing, or doorway without a door, at the end of the said forward platform, in the walls or structure enclosing the said platform, which opening was a passageway for persons from said tourist sleeping-car to said dining-car, and therefrom to such tourist sleeping-car, and that said forward platform of said tourist sleeping-car closely joined the rear platform of the first-class passenger day-coach in said train, which said rear platform of said first-class passenger day-coach was vestibuled and entirely closed at the sides and end, except for an opening, or doorway without a door, at the end of said rear platform, in the walls or structure enclosing said rear platform, which opening formed a passageway for persons to said first-class passenger day-coach from said tourist sleeping-car on said train, and from said first-class passenger day-coach to said tourist sleeping-car on said train; and that said first-class passenger day-coach was immediately in the rear of the smoking-car in said train, and said two last-mentioned cars were connected by adjoining platforms, and that both of the said adjoining platforms between said first-class passenger day-coach and said smoking-car were vestibuled and were entirely enclosed, except for an opening at the end of each of said platforms similar to that heretofore described as at the end of the platform of the said dining-car, and that the vestibuling of the said adjoining platforms of the said smoking-car and said first-class passenger day-coach formed the passage-way from the said smoking-car to the said first-class passenger day-coach; that on each side of the steps leading up to the said unvestibuled platforms of said tourist sleep-
86 ing-car there was an iron hand-rail, and that one of said hand rails extended from a lever with the floor of the said platforms, where it was attached to the end of the body of the car near the corner formed by the end and side, vertically upward along the end of the body of the car, for about thirty inches, and then

turning at a right angle, ran along the end of the body of the car to the frame of the door in the end of the body of the car, where it was again attached to the end of the body of the car, and that it projected from the end of the body of the car about three inches; and that the hand-rail on the other side of the said steps near the free end of the platforms started from the outer end of the front cross-beam which formed the free end of said platform at a point in line with the side of said car and with the outer edge of the lowest step of said car, and extended vertically upward from the end of said beam about thirty inches above the level of said platform, and then turned at a right angle and extended above, parallel with, and along the margin of the free ends of said platforms to within a short distance of a similar rail from the other side of the said platforms, where, turning at a right angle, said rail descended vertically to the floor of said platforms, where it was attached at the free end of said platforms, an open space between the said hand rails at the free ends of the said platforms being left for a passageway to said platforms from platforms of other cars, and from said platforms to platforms of other cars. That the rear platform of the said dining-car was vestibuled as the other vestibuled platforms herein described, and that
87 the cars in the rear of the said dining-car were sleeping-cars, all the platforms of which sleeping-cars were vestibuled. The said platforms of said tourist sleeping-car being the ordinary form of platform in use upon the ordinary unvestibuled passenger coaches.

The above facts shall be considered as admitted in evidence on the trial of said cause, if the court shall, upon the objection of said defendant, hold that the said facts are material, competent and relevant, and that said defendant may at the time of offering this statement of facts, on the said trial, object to the said facts, and each of them, as evidence, and to their being received in evidence, upon the ground that the same are irrelevant, incompetent, and immaterial, and the court shall pass upon said objection the same as though the facts herein stipulated were offered in evidence in the ordinary way.

Thereupon the court admonished the jury, and took a recess until 1.30 p. m.

GEORGE S. GABBART, testified as follows:

Direct examination.

(By Mr. C. S. VOORHEES:)

Q. Please state your full name to the jury.
A. George S. Gabbart.
Q. Where do you reside?
A. Spokane.
Q. How long have you lived in Spokane?
A. Some ten or twelve years.
Q. What is your occupation, Mr. Gabbart, and what was your occupation on the 13th of November, 1898?

88 A. I was in the mining business at that time and have been all of the time I have been in this country.

Q. Were you acquainted with Jay H. Adams in his lifetime?

A. I was.

Q. How long had you known Mr. Adams?

A. I had known him personally about two years before that time.

Q. Did you see Mr. Adams during the month of November, 1898?

A. I did.

Q. On what day in November, what particular day do you recall that you saw Mr. Adams, in November of 1898?

A. The 13th of November.

Q. Now, just tell the jury the circumstances under which you saw Mr. Adams on the 13th of November, 1898?

A. I met Mr. Adams at the Northern Pacific train about 8 o'clock in the morning and we made a trip to Hope, Idaho, together.

Q. You left Spokane about 8 o'clock in the morning?

A. About 8 o'clock; yes, sir.

Q. And what was the purpose of Mr. Adams and your business at Hope on that day?

Mr. THOMPSON: I think that is immaterial. The court has passed through the case once and knows that it is wholly immaterial what his business was that day.

(Objection sustained. Plaintiffs allowed an exception.)

Q. How long did you remain in Hope with Mr. Adams?

89 A. I don't remember how many hours, but from the morning train until the afternoon train, from the time the train arrived there in the morning until the afternoon train left, a few hours, but I don't remember how long.

Q. What time did you leave Hope, if you left Hope upon that day in the afternoon?

A. About 4 o'clock, probably a little——

Q. (Interrupting.) Do you recall what time the train reached Spokane that evening?

A. I do not.

Q. Now, when the west-bound train No. 1 arrived at Hope what did you and Mr. Adams do, if anything, with reference to taking the train for Spokane?

A. Do you mean to ask at what point we boarded the train?

Q. Yes; what did you do; did you board the train?

A. We boarded the train between the day-coach and the smoker, and took our seats pretty well forward in the smoking-car.

Q. What was done when you took your seats in the smoking-car as to throwing seats together, or otherwise?

A. I turned two seats together or apart, so that they were facing each other.

Q. And which seat did you occupy?

A. I occupied the one looking to the rear of the car.

Q. You were riding backward then?

A. I was riding backwards.

Q. And Mr. Adams took which seat?

A. The seat fronting me, facing forward.

90 Q. What, if anything, did Mr. Adams do with his overcoat, if he had one?

A. He removed his overcoat and laid it on the seat and left it there when he left the car.

Q. Now, when did he leave the car with reference to the time of the train leaving Hope?

A. He left the car shortly after the train started, but exactly how long I could not state.

Q. What did he leave the car for?

A. He stated that he was——

Mr. THOMPSON: We object to what Mr. Adams stated. It is no part of the *res gestæ* in the case.

(Objection overruled. Defendants allowed an exception.)

A. He stated he was going to the dining-car to get some cigars.

Q. Were you smoking when you boarded the train?

A. Yes, sir.

Q. And was he smoking?

Mr. THOMPSON: We desire at this time to object, your honor, and to be considered as repeating the objection all through, and request counsel not to lead his own witnesses, and we object to the question as leading.

(Overruled. Defendants allowed an exception.)

A. I don't remember whether he was smoking at that time.

Q. When he arose what did he say about what he was going to do?

Mr. THOMPSON: The same objection, if your honor please.

91 (Objection overruled. Defendant allowed an exception.)

A. He said he was going to the dining-car to get some good cigars.

Q. Did you see him go out of the car?

A. I don't remember that I noticed him going out of the car; no, sir.

Q. Did he return when he left after having secured some cigars?

A. He did not.

Q. Did you see him again on that trip?

A. I did not.

Q. Did you see him after you reached Spokane, after the train reached Spokane?

A. I did not.

Q. When did you next see Mr. Adams?

A. I saw his body lying near the railroad track.

Q. When was that?

A. That was on the 14th of November.

Q. When you reached Spokane what, if anything, did you do to ascertain the whereabouts of Mr. Adams, when you missed him?

Mr. THOMPSON: We object as wholly immaterial and irrelevant as to what action he took.

(Overruled. Defendants allowed an exception.)

A. You mean at that time?
Q. After the train reached Spokane at the station.
A. I took his overcoat and walked through the train, thinking I would meet him, and then inquired of the station agent if he saw him pass in.
Q. And you got no trace of him?
A. No, sir.
92 Q. Now, where were you when you saw his body by the side of the railroad track?
A. You mean the distance from some point?
Q. Yes, where with reference to Hope, approximately?
A. Approximately seven miles from Hope.
Q. Where was the body lying with reference to the railroad track?
A. It was lying on a slope some distance from the railroad track.
Q. How far from the railroad track would you say the body was lying when you first saw it?
A. Approximately, sixty or seventy feet in a right line—is that what you mean?
Q. In a right line. Where was it lying with reference to the curve, do you remember any indications of the ground, any indications of blood that you saw at that time?
A. Yes, sir.
Q. Where were the indications of blood, the first blood indication from the railroad track towards the lake?
A. In a right line, or diagonally?
Q. Diagonal line.
A. I don't remember that.
Q. If you had drawn a line through the points which lay between the point where you found the body and the railroad track, a diagonal line, how far would the blood spots, the first blood spots that you saw be from the railroad track, from the point where that line would intersect the railroad track?
A. I don't remember that distance.
Q. You don't remember?
A. No, sir.
93 Q. Drawing a line through the points of blood from the point where the body lay until it intersected the railroad track, how far would it be from the point where that line intersected the railroad track—to the point where the body was found?
A. I don't remember that, only I remember estimating from that spot to where the body was found.
Q. From that spot to where the body was found. What did you estimate that?
A. Some forty feet.
Q. Now, what was done after you had found the body; what, if any thing, did you do in connection with the body or aid in doing?
A. I assisted in carrying it and putting it on the car.

Q. You may state to the jury which spot you had reference to when you said there was a spot forty feet from the body?

A. Where there was some blood on the rocks, where the body had apparently struck.

Q. And you don't now recall how far it was from the point where this line that I have described would intersect the railroad track to the point where you found this blood, which was forty feet, as you estimated it, from where the body was found?

A. I don't recall that distance from that first spot to the track on a diagonal line.

Q. Is it a part of your business, Mr. Gabbart, to estimate distances with the eye?

A. I have had some experience in that respect.

94 Q. Now, Mr. Gabbart, after the train left Hope you may describe to the jury the character of the speed which had been attained prior to Mr. Adams' leaving the car to go to the dining-car to secure the cigars. What was the character of the speed which the train had attained at that time?

A. I don't remember as to the speed at that time.

Q. Whether it was fast or otherwise?

A. No, sir.

Q. You don't recall?

A. I do not.

Q. Do you remember crossing the pack river trestle on that occasion, Mr. Gabbart?

A. I do not; no, sir.

Q. Did you at any time notice any unusual motion of the car in which you were riding during your trip after you got into the car at Hope and after Mr. Adams had left the car to go after the cigars?

A. I did.

Q. About how long after Mr. Adams left the car did you notice that motion?

A. I could not state how long it was.

Q. Was it a long time or a short time?

A. It was not a long time, but I don't know how long it was.

Q. You may describe to the jury the character of the motion, which you noticed.

A. Only the swinging and lurching of the car.

Q. What effect, if any, did that have upon you, Mr. Gabbart; tell the jury.

A. It jostled me in my seat, or moved me in my seat against the end of the seat at one time, probably when striking a curve.

95 Q. Now, you may state to the jury from your experience at that time what impression was made upon your mind as to whether the speed was fast or otherwise.

Mr. THOMPSON: We object to his stating what impression was made upon his mind. He may state any facts that he may know.

(Overruled. Defendants allowed an exception.)

A. What was the question?

Q. I asked you for your impression as to the rate of speed at

which the train was traveling when you noticed this jostling swinging motion which threw you against the end of the car seat.

A. The rate of speed?

Q. The impression, whether it was fast or otherwise?

A. It impressed me as being fast, of course.

Q. Now, when you entered the train at Hope from the rear platform of the smoking-car, as you have stated, tell the jury what the fact was as to whether or not the platforms were vestibuled at that point?

A. I am not positive as to both being vestibuled; the day-coach, I think, was vestibuled, but I am not positive as to both.

Q. You say you were acquainted with Mr. Adams for a period of two years?

A. Personally acquainted with him; I knew of him longer than that.

Q. On the 13th day of November, 1898, you may tell the jury what condition of health Mr. Adams appeared to be in on that day.

A. He appeared to be well, as far as I knew.

96 Q. What has been your experience in traveling over the Northern Pacific railroad, whether much or little?

A. I have traveled considerably over the Northern Pacific line.

Q. What was the character of the speed that you have described, as to whether or not it was the usual rate of speed which trains had attained when you had traveled over the Northern Pacific?

A. Well, the trains have attained all kinds of speeds, most all trips I have traveled over them.

Q. As to whether it was usual or unusual?

A. Well, I think it was unusual on a crooked track.

Q. Now, when you entered the car, the train at Hope, who boarded the train first, you or Mr. Adams?

A. My memory is that I boarded it first.

Q. You boarded it first. You walked to the front part of the smoking car and sat down?

A. Yes, sir.

Q. Do you recall when Mr. Adams left the car, with reference to the time that the conductor had come along and taken up the fares, whether before or after?

A. He left the car after the conductor had taken up the fares.

Q. Now, in your experience, Mr. Gabbart, in estimating distances by the eye, what has been your experience as to the accuracy with which you can do that—in estimating distances how far from one point to another point?

A. That depends on a great many circumstances, as to lay of ground and otherwise; sometimes they are correct and sometimes they are not.

97 Q. But you have done a good deal of it?

A. Yes, sir.

Cross-examination.

(By Mr. THOMPSON:)

Q. You don't think your ability in that direction is any better than any ordinary careful man who is in the habit of making observations?

A. Who has experience in that line; no, sir, I don't.

Q. Now, Mr. Gabbart, you say that Mr. Adams left the car, according to your recollection, and went back after making his statement with reference to what he was going to get, after the conductor had come through and taken up your fares?

A. Yes, sir.

Q. What makes you recall that fact?

A. I noticed that he had a pass and I mentioned it.

Q. Who do you mean, the conductor or Mr. Adams?

A. Mr. Adams

Q. What caused you to mention it?

A. I had not noticed it before, I suppose.

Q. That was when the conductor was taking up your fare?

A. Yes, sir.

Q. And there was some conversation between you at the time that fixed that in your memory?

A. Yes, sir.

Q. How long did the conductor remain there with you?

A. I could not answer that; I don't remember that he remained there any longer than the usual length of time for taking up tickets.

98 Q. Did he take the number, etc., of Mr. Adams' pass on a little sheet of paper when it was presented to him?

A. I could not say as to that; I don't know.

Q. You don't know whether he went through that formality or not?

A. No, sir.

Q. Or whether he just merely looked at it?

A. Yes.

Q. Did you pay him money or did you have a ticket?

A. I had a ticket.

Q. You gave him a ticket?

A. Yes, sir.

Q. Now, when you left Hope and got up on the train, do you have a definite recollection as to whether you got in first or is it only an impression that remains upon your mind?

A. That is an impression, from the fact that I went through the aisle first and fixed the seats.

Q. That is what makes you think you got on first, because you went up the aisle first and fixed the seats, turned one seat over?

A. Yes, sir.

Q. You don't have any impression at all as to whether the two cars were vestibuled that you got in between, but you do have an impression that one of them was?

A. I do have an impression that one was.

Q. And that was not the step that you went up?
A. No, sir.
Q. But the other one?
A. Yes, sir.
Q. You have an impression that it was vestibuled?
A. Yes, sir.

99 Mr. THOMPSON: Gentlemen, have you agreed upon what you will do with reference to the matter suggested by the court?

Mr. C. S. VOORHEES: No, we will not make any statement with reference to that.

Redirect examination:

Q. When was it that Mr. Adams threw his overcoat over the back of the seat—before he sat down or just before he passed out going after the cigars?
A. I don't remember that, whether he left the coat when he first came in or when he left the car.
Q. Do you know whether he had any cigars with him other than the ones that you were smoking?
A. I don't know that; no, sir.

(Excused.)

Upon Tuesday, December 1, 1900, at 9.30 a. m., court met pursuant to adjournment.

LOUIS H. JEANNOT, sworn on behalf of plaintiff, testified:

Direct examination.

(By Mr. C. S. VOORHEES:)

Q. State your full name to the jury, Mr. Jeannot.
A. Louis H. Jeannot.
Q. Where do you reside?
A. Hope, Idaho.
Q. What is your business?
A. Merchant.
Q. What kind of a merchant?
A. General merchandise.
100 Q. How old are you, Mr. Jeannot?
A. Thirty-one.
Q. How long have you resided in Hope?
A. Eight years.
Q. What county is Hope in?
A. Kootenai county.
Q. In Idaho?
A. Yes, sir.
Q. Situated on Lake Pend d'Oreille?
A. Yes, sir.
Q. During the eight years that you have resided in Hope, what

has been your practice as to traveling backwards and forwards between Hope and Spokane?

A. I make the trip frequently.

Q. About how frequently, Mr. Jeannot?

A. Oh, twice a month.

Q. Over what road?

A. The N. P.

Q. The Northern Pacific?

A. Yes.

Q. Do you recall visiting Spokane on the 13th day of November, 1898?

A. Yes, sir.

Q. What was the character of that day, Mr. Jeannot, if you remember, as to being cloudy or sunshiny, clear, or otherwise?

A. It was cloudy.

Q. Do you remember the time that the west-bound train was scheduled to leave Hope on that day?

A. Why, it was a few minutes after one o'clock.

Q. What time due to arrive there from the east?

A. Why, it generally arrived ten minutes before.

Q. On what time?

A. On the Rocky Mountain time.

101 Q. On the Rocky Mountain time, and what becomes of the Rocky Mountain time at the town of Hope?

A. It changes there and takes the Pacific time.

Q. The Pacific time is earlier or later?

A. It is earlier.

Q. So that if a train were scheduled to arrive at Hope at five o'clock Rocky Mountain time, it would leave Hope on Pacific time at four o'clock?

A. Yes, sir.

Q. How many trains on the 13th of November, and thereabouts, were running west-bound from Hope on the Northern Pacific; how many passenger trains?

A. One.

Q. And that, I understand it, was due to leave in the afternoon?

A. Yes, sir.

Q. The train that you took coming to Spokane on that day, left Hope about what time?

A. It left Hope after four o'clock, I believe.

Q. Do you recall just how much after 4 o'clock?

A. Well, no; I don't know exactly, but I think it was fifteen or twenty minutes after.

Q. What was the condition of the day, Mr. Jeannot, as to being light, daylight, at the time the train left Hope for Spokane?

A. Why it was not very light; it was rather a cloudy day; and kind of dusk like.

Q. Were you acquainted with Mr. Jay H. Adams?

A. Yes, sir.

Q. Did you see Mr. Jay H. Adams on the 13th day of November, 1898?

A. Yes, sir.

Q. Where did you see him?

102 A. I saw him at Hope.

Q. When did you see him first at Hope?

A. I saw him shortly after the morning train had got in there.

Q. Yes. Did you see him after that?

A. Well, I saw him during the day a couple of different times on the street.

Q. Yes. And when was the last time you saw him?

A. The last time I seen him was on the train.

Q. On the train. Did you see him before he got on the train?

A. Yes, I saw him at the depot.

Q. At the depot?

A. Yes.

Q. What was he doing at the depot?

A. He was waiting for the train there, apparently. He was walking up and down the platform.

Q. Did you see him board the train? Did you see him get aboard the train?

A. Get aboard—I could not say whether I did or not; I could not recollect.

Q. Now, when you saw him on the train, in what way was your attention attracted to Mr. Adams?

A. Why, he was taking off his overcoat, or had it off, taken it off, and threw it over the back of the seat.

Q. Had the train started at that time?

A. Why I believe it had.

Q. When was it with reference to the time when you saw the conductor—you did see the conductor that day did you?

A. Oh, yes.

Q. Yes; he took up your fare?

A. Yes.

Q. When was it with reference to the time you saw the

103 conductor when Mr. Adams took off his overcoat and threw it over the back of the seat—that is, as to whether or not the conductor had taken up your fare at that time?

A. I believe the conductor was just about taking up my ticket; I don't know whether he had just taken it up; he was just about to me.

Q. And where were you standing; in what car were you?

A. I was in the combination day-coach, smoking-car, and day-coach combined.

Q. You say combination; how did it become a combination?

A. Well, they had a partition in the car, you know.

Q. Yes.

A. And you are allowed to smoke.

Q. Where was that partition?

A. I should judge about the center of the car.

Q. How was the partition constructed?

A. Why, it was just a light partition, with a glass door in the center of it.

Q. And what was the condition of that door at the time you are speaking of, when you got aboard the train and saw Mr. Adams?

A. Well, when I saw Mr. Adams the door was open.

Q. Now, what, if anything, Mr. Jeannot; were you bringing to Spokane on that train.

A. I was bringing an elk head, to have it mounted.

Q. And where were you with that elk head, after you got in aboard of this combination smoking-car?

A. Why, I set the horns near the water-tank, and I just stepped inside of the coach.

104 Q. Is that in the rear or forward part of the car?

A. That is the rear end of the car.

Q. Rear of the car?

A. Yes.

Q. And what did you do after you had set the horns, the elk head in that position?

A. I stood up there to kind of watch them, so that no one would run against them, or they would not fall over.

Q. Do you recall at this time, Mr. Jeannot, the condition of the speed between Hope and Pack River bridge—are you familiar with Pack River bridge?

A. Yes, sir.

Q. Do you know where it is located?

A. Yes, sir.

Q. How long is that bridge?

A. It is about a mile and a quarter long.

Q. Now, you may state to the jury, what, if anything, you observed as to the rate of speed on that day from Hope to the Pack River bridge—to the east end of Pack River bridge.

A. Why, I don't know as I noticed anything unusual; the speed was about the same as they always make there.

Q. Do you recall the rate of speed at which the train passed over Pack River bridge on that day?

A. No, I don't know as I do.

Q. Do you remember passing over Pack River bridge?

A. Yes.

Q. You stated a moment ago that you stood up for a time,

105 and then sat down. Do you remember when it was you sat down, with reference to the time when the train left the west end of Pack River bridge?

A. Why, it was shortly after we had got off of the trestle, the train increased its speed there.

Q. Shortly after it got off of the trestle?

A. Yes, sir.

Q. Within what distance, would you say?

A. Oh, possibly half to a mile.

Q. Half a mile to a mile?

A. Yes.

Q. And you say the speed was increased as they left the Pack River trestle?

A. Yes, sir.

Q. Now, what induced you to sit down at the time you did?
A. Well, the motion of the train was so that I could not very well stand up; so I took a seat.
Q. How far is it, or was it then, Mr. Jeannot, from Hope to Pack River trestle?
A. Why, they call it four miles.
Q. Yes; call it four miles. Now, Mr. Jeannot, at the time that you sat down, a half a mile or a mile west of the west end of Pack River trestle, tell the jury what rate of speed in your judgment the train was making at that point and at that time.
A. Why, I thought they was going pretty fast, there.
Q. Well, you say pretty fast. How fast, with reference to the ordinary schedule time, when the train was on time, at that point?
A. Oh, it was going a third faster than usual, I should think.
106 Q. Going a third faster than usual. Would you be able to estimate that speed, Mr. Jeannot, in miles?
A. I thought myself that it must have been about sixty miles an hour.
Q. About sixty miles an hour?
A. Yes, sir.
Q. Had you at times prior to the 13th day of November, 1898, had occasion to visit Spokane upon the train, a belated train out from Hope?
A. Quite frequently.
Q. I will ask you what is the fact, as to whether or not, at the point you have described, half a mile or a mile west of the west end of Pack River bridge, you have on days other than the 13th of November, 1898, and prior thereto, observed that train making faster speed than that fixed by the schedule?
A. No; I never noticed it before.
Q. You had never noticed it before?
A. No, sir.
Q. Do you remember Fisherman island?
A. Yes, sir.
Q. A landmark on the lake shore?
A. Yes, sir.
Q. Do you remember seeing Fisherman island that night?
A. No, I did not—I don't remember of noticing it.
Q. How far is Fisherman island west of the west end of Pack River bridge?
A. Why, I should judge about three miles.
Q. And where were you when you sat down, with reference to Fisherman island?
A. Oh, I was a couple of miles east of there, I should judge.
Q. Did you see Mr. Adams at any time, Mr. Jeannot, after
107 you saw him take off his overcoat and throw it over the back of the seat?
A. No, sir.
Q. Neither in life nor death?
A. No, sir.
Q. Did not see him when his body was returned to Hope?

A. No, sir. I was in Spokane at the time.

Q. Now, at the time that you saw Mr. Adams take off his coat and throw it over the seat, I understood you to say that you thought the conductor was just about taking up your ticket: Was there anything happened at that time between you and the conductor?

A. Well, no——

Q. With reference to the horns?

A. No; it was after that.

Q. It was after that?

A. Yes.

Q. The conductor had passed out of the car, and it was upon his return that you had some talk with him about the horns?

A. No; the conductor had not left the car yet—the brakeman came in from the other coach, and asked the conductor whose horns those were up there, and he says, "I will see about it in a minute;" and he finished up taking up the tickets in the car.

Q. And then returned?

A. And then went out.

Q. Well, when did he have the talk with you about the horns?

A. That was shortly after he had taken up my ticket.

Q. Yes; before he left the car?

A. I believe it was, yes.

Q. What was the character of that controversy between you and the conductor?

108 A. Why he said that I ought to have had those horns in the baggage-car, or expressed them. And I told him that the baggage-man would not accept the horns because they were not crated; and as I wanted to take them along with me a short distance I thought it would be all right to stand them up in the corner of the car there.

Q. Now, in connection with those horns, I will ask you if you had occasion prior to the departure of the train from Hope, to visit the baggage-room at the station of Hope?

A. Yes, sir.

Q. And I will ask you what the condition of the light was in the baggage-room to enable you to find what you visited the baggage-room to find?

A. We had to strike a match in order to get what I went for, which was a scalp of the elk head, a scalp of that elk head, you know.

Q. What was the condition of the lamps on the train as you observed them, at the time of the departure of the train from Hope?

A. Why, I believe the lamps were lit.

Q. The lamps were lit. That is all.

Cross-examination.

(By Mr. THOMPSON:)

Q. Mr. Jeannot, you are the same Louis H. Jeannot that testified at the former trial of this case?

A. Yes, sir.

Q. You claimed then that your name was Jeannot (pronounced Juno), did you not?

109 A. Not that I know of.

Q. You did not say it was Juno?

A. No.

Q. Mr. Jeannot, you say now at the time that the train passed over this trestle which is known as Pack River trestle, that you did not notice anything about the rate of speed?

A. I don't recollect as I paid any particular attention to it.

Q. On the former trial of this case you testified particularly as to the rate of speed, didn't you, both at the time they were passing over the trestle, and the rate of speed at which they left the end of the trestle?

A. I couldn't say, I am sure.

Q. What is that?

A. I couldn't say, I don't remember.

Q. I will ask you if you did not make this statement on the former trial of this case, the question being asked you: "When the conductor came to you to get your ticket you think you had just passed off the end of Pack River trestle?" Answer: "No, we had not got that far yet, I don't think. We was just about to the trestle, or on the trestle." Question: "Further on, on the trestle?" Answer: "Yes, sir." I will ask you if you did not testify to that on the former trial of this case?

A. I don't know, but what I did.

Q. What is that?

A. I think I did.

Q. Then the question was asked you: "And you think you ran over that trestle at about what speed?" Answer: "Oh, possibly at about twenty or twenty-five miles an hour." You answered that, did you not?

110 A. I believe I did, yes sir.

Q. Then I will ask you if later, at another time, when you were questioned, you were not asked this question: "What was the rate of speed, would you say, in miles, that they were going just as you got off of Pack River trestle?" Answer: "Sixty or sixty-five miles an hour." I will ask you if you did not testify to that at the former trial of this case?

A. I have no doubt but what I did. I don't just recollect.

Q. Then, I will ask you if the next question was not asked you: "And for how great a distance, Mr. Jeannot, would you say that speed was continued?" And you answered: "Well, that speed was continued pretty well all the way to Spokane, sometimes a little faster and sometimes a little slower; that would be about the average, I should judge." You testified to that on the former trial of this case, did you not?

A. Yes, sir.

Q. That is all, Mr. Jeannot.

Re-examination:

Q. Now, Mr. Jeannot, I will ask you if you did not also state on the former trial what you meant by testifying—by the statement which Mr. Thompson has just stated to you as having been made by you on the last trial—having been recalled?

A. I don't quite understand your question.

Q. I will ask you if you were not asked on the last trial, after you had made the statement which Mr. Thompson has repeated
111 to you, which you say you did make, if you were not asked to state to the jury how you desired to be understood in making the statement which Mr. Thompson has just detailed to you?

A. Well, I had reference to—at places that the train made an unusual speed, faster than I had ever rode before, and it was remarked by the passengers in the coach in general, you know.

Q. Yes; what did you mean to be understood, as to whether or not the average rate of speed between Hope and Spokane was sixty or sixty-five miles an hour all the way?

A. Well, of course what I meant by that was that at places they run very fast; of course other places why it was not so fast.

Q. I will ask you if you did not on the last trial say this, when you were asked—"Now, Mr. Jeannot, you stated yesterday you thought the train was running, after leaving Pack river, all the way to Spokane at sixty-five miles an hour, a little more or a little less; please state to the jury what you intended to be understood as meaning by that." You were asked that question, and I ask you whether or not you made this statement in response to that question: "Well, I intended to be understood that just when they were running faster it was about that speed; of course it was not a continuous rate; there were several stops, and they naturally slowed up in these places stopped, but occasionally they struck quite a rapid rate of speed, faster than usual."

A. Yes, sir.

112 Recross-examination:

Q. You don't think then that the average rate of speed was anything like sixty or sixty-five miles an hour, do you, Mr. Jeannot?

A. Not all the way to Spokane; no.

Q. Well, but the average rate of speed, you don't think they ran that fast all the way, but you don't think the average rate of speed was anything like that, do you?

A. No; I don't hardly think it was.

Q. What induced you to testify to it, then, on the former trial?

A. Well, I had reference to particular places, you know, where they were going the fastest.

Q. You thought some places they did run that fast?

A. Yes, sir.

Q. And you thought they picked out the curves as the places to make that fast speed, didn't you?

A. No, sir.
Q. That is all.

(Excused.)

JAMES L. CARUTHERS testified.

Direct examination.

(By Mr. C. S. VOORHEES:)

Q. State your full name to the jury, Mr. Caruthers.
A. James L. Caruthers.
Q. Where do you reside?
A. Helena, Montana.
Q. How old are you, Mr. Caruthers?
A. Thirty-seven.
113 Q. What is your occupation?
A. Railway mail clerk.
Q. What was your occupation on the 13th day of November, 1898?
A. Railway mail clerk.
Q. Where were you running as a railway mail clerk?
A. From Helena to Spokane.
Q. How are you employed as a railway mail clerk, whether by the railroad company, or otherwise?
A. By the Government.
Q. The Government?
A. Yes, sir.
Q. How long have you now been in the railway mail service?
A. About five years.
Q. When did your connection with the railway mail service begin, with reference to the 13th day of November, 1898?
A. At that time I had been in the service about two years and eight months.
Q. How long at that time had you been running between Hope and Spokane?
A. About eight months.
Q. Do you remember approximately when the train, which was No. 1, was it not, west bound, on that day——
A. Yes, sir.
Q. —reached the town of Hope, in Idaho?
A. Yes, sir, about.
Q. Well, approximately, about what time was it? Was the train on time or otherwise?
A. It was about two hours late, I believe. Arrived about four o'clock in the evening.
Q. Do you remember the arriving time at Hope?
114 A. That is, the schedule?
Q. Yes.
A. One o'clock, I believe.
Q. One o'clock by what time?

A. Rocky Mountain time.

Q. One o'clock by Rocky Mountain time?

A. No; that was Idaho time, I guess, they call it; it is the time they change to there.

Q. Then what time would be the arriving time by the Rocky Mountain time?

A. Two o'clock. It is an hour faster.

Q. Do you know definitely when that train reached Spokane that evening?

A. Yes, sir.

Q. What time?

A. 6.10.

Q. Do you recollect what the character of the day was when you left Hope, as to being cloudy or otherwise?

A. I don't remember about that.

Q. You don't remember about that?

A. No, sir.

Q. Do you remember whether or not the lights were lighted?

A. Yes, sir; I had the lights lighted in the car.

Q. You had the lights lighted in the car? What car do you mean by that?

A. The mail-car.

Q. Where is the mail-car situated in the makeup of the train, Mr. Caruthers, and — was it that day?

A. Right next to the engine.

Q. Right next to the engine. And immediately following that is which car?

A. The baggage-car generally.

Q. And following that?

115 A. Well, if there was not two baggage-cars, the express-car comes next.

Q. The express-car? How is the mail-car constructed, with reference to the door?

A. It has two doors on each side near the end.

Q. On each side?

A. Yes, sir.

Q. Where, if at all, are the doors placed in the end of the car?

A. There are no doors in the end.

Q. There are no doors in the end of the car?

A. No, sir.

Q. After leaving Hope upon that day, Mr. Caruthers, what, if anything, did your duty require of you in connection with the mail?

A. Why, on that occasion I had a lot of paper sacks in the iron racks that I had not taken out yet and piled in the car; and that was my work to do, from Hope this way.

Q. Well, where did you commence dispatching that character of work after leaving Hope?

A. Why, almost immediately. I had first taken the Sandpoint mail and put that in a pouch and locked it, and put it in the door, and then proceeded to tie up the paper mail in the car.

Q. Did you experience any difficulty in dispatching that work after leaving Hope?

A. Yes, sir.

Q. Between Hope and Pack River trestle?

A. I did not notice anything out of the way——

Q. (Interrupting.) Do you know where Pack River trestle is located?

A. Yes, sir.

Q. About how far is that from Hope?

116 A. About four miles, I believe.

Q. Do you remember passing over Pack River trestle that night?

A. Yes, sir.

Q. You may state to the jury what the character of the speed was upon that run between Hope and the east end of Pack River trestle.

A. I did not notice anything unusual.

Q. Did not notice anything unusual?

A. No.

Q. How much, if any, work did you dispatch between Hope and the Pack River trestle?

A. Why, I had tied up and piled out probably three or four sacks of mail.

Q. When you got to Pack River trestle did you notice anything in connection with the speed before you had gotten off of the Pack River trestle?

A. Yes, sir.

Q. State to the jury what that was.

A. I think it was just past the center part, as near as I can recollect, the motion of the car was such that I observed it very particularly, and began to try to locate myself, to see whether we had got off of the bridge or not. And I had stood there a moment, and I saw the light in the Pack River section-house I believe it is.

Q. Where is that Pack River section-house located with reference to that bridge, whether at the east or west end of the bridge.

A. It is just at the west end.

Q. And on which side of the track coming this way; the right or the left-hand side?

A. It would be on the right side.

Q. On the right-hand side?

A. Yes, sir.

117 Q. The side farthest away from the lake?

A. Yes, sir.

Q. In other words, the main line of the track would be between the station-house and the lake?

A. Yes, sir.

Q. That is right, is it not?

A. Yes.

Q. Now, when you passed the Pack River station-house, got your bearings by seeing the light there, tell the jury what the character of the speed was then.

A. Well, it was fast.

Q. When you say fast, what do you mean, with reference to the usual rate of speed made by this train at this point on other occasions?

A. Well, it was at least a third faster than the usual rate.

Q. Was there anything else, did you hear anything that attracted your attention to the character of the speed that was being made.

A. Yes, sir; and I noticed the light at the same time my attention was called to the exhaust of the engine—"talking," as I call it.

Q. "Talking," as you call it?

A. She was talking for all she was worth.

Q. Yes. And what, if anything, did you see as to the sparks?

A. Why, they were coming down all over the car; the air was full of sparks.

Q. Now, how many miles per hour would you say the train was making as it left the west end of Pack River trestle?

118 A. Fifty miles is what—that is my estimation.

Q. That would be you- estimate, would it?

A. Yes, sir.

Q. And state whether or not within any distance immediately thereafter the speed was increased?

A. It was.

Q. Within what distance would you now recollect that that speed was increased?

A. Well, it was increased just as fast as steam could do it.

Q. And within what distance, would you say?

A. Well, it was increased right along from each—just as fast as steam could do it.

Q. What rate of speed would you say that train had attained at a point a half a mile west of the Pack River bridge.

A. Perhaps five miles more; fifty-five miles an hour.

Q. At a point a mile and a half west of the Pack River station what would be your judgment as to the rate of speed at which that train was proceeding?

A. Sixty miles; that is my best judgment in the matter.

Q. Now, after you left the Pack River trestle, please tell the jury what work if any you dispatched between there and Sandpoint.

A. Did not do a thing only hold on to keep from being knocked around the car, until I got to Sandpoint.

Q. After leaving the west end of Pack River bridge, in what other way, if any, was your attention attracted to the rate of speed at which the train was proceeding?

119 A. The swing or lurch of the car. When it would strike a curve it would swing out, lean outward in place of in, and the mail from the inside would fall out.

Q. Describe to the jury where the mail is carried in a mail-car.

A. It is ricked up along the sides of the cars. It is piled up there by men down on the route who work the Washington mail. And they catch the sacks at the bottom and dump the mail into the other end of the sacks when they are not full. And when they first commence to pile them, the sacks, they pile them about a foot

from the wall, and as it goes up they pile them against the wall so that the mail when you stand in a car and look, it sets that way, up to the roof; and on this occasion, when they would strike a curve that way the mail on this side of the car fell over outward.

Q. How many sacks do you now recall fell out on that occasion.

A. Why, there were several sacks; I did not count them.

Q. And where did that mail fall, with reference to the departure of the train from the west end of Pack River trestle?

A. Why, the first short curve that they struck there was a lot of those sacks—several of them fell off.

Q. And for how long a distance did those sacks continue to fall off?

A. Why, there was some more fell I believe when we got over to about Kootenai. Probably there was a little more fell over there.

120 Q. That was before you reached——

A. Sandpoint.

Q. —Sandpoint. Do you now recall the rate of speed at which that train passed on to the east end of Pack River trestle?

A. Passed on the east end?

Q. The east end.

A. I did not notice anything out of the way until I got about e center of the trestle; not having my attention called to it, why of course I could not say.

Q. Prior to the 13th day of November, 1898, do you recall the rate of speed attained by that train upon other days when the train was belated and behind time, on that particular piece of track—that is to say, the piece of track between the west end of Pack River bridge and a point a mile and a half or two miles—two miles west?

A. No, sir. I never rode before nor since anything like that fast.

Q. Do you recall at any time prior to the 13th of November, the fact as to whether or not when the train was belated a speed was or was not attained at that point different from the ordinary schedule time when the train was on time?

A. Why, they sometimes run faster than the schedule time there; but I never noticed anything unusual

Q. They sometimes run faster than the schedule time?

A. Yes, they sometimes run faster than the schedule time.

Q. On that particular piece of the track?

A. Yes, sir

121 Q. Were you familiar with the practice at that time of slowing up on the Pack River trestle or Pack River bridge?

A. Yes, sir.

Q. What was the usual practice?

A. They generally did some; not very much, though.

Q. Do you have any recollection as to whether or not there was a slow-down on this particular occasion?

A. I do not think they did.

Q. That is between the middle of the trestle—the middle of the

bridge, when you first noticed the high speed, and the east end of the bridge?

A. My impression is that they just ceased to increase speed. That was the impression that I have—until they got to about the center of the bridge.

Q. Now, what familiarity, if any, did you have as to the general character of the track at that time, between Hope and the Pack River trestle?

A. It was a very crooked track. In good condition, generally.

Q. Yes. And what did you know at that time of the character of the track, as to being crooked or otherwise, between the west end of Pack River trestle and Oden? Do you know where Oden is?

A. About, yes, sir.

Q. Yes.

A. Why, there is some curves in there, but it is not as crooked as it is east of the trestle.

122 Cross-examination.

(By Mr. THOMPSON:)

Q. Mr. Caruthers, the first that you observed of this high speed, and the first thing that attracted your attention to this high speed, was about the middle of the Pack River trestle, you say?

A. Somewhere near there. It might have been a little east of the center or west of the center.

Q. Was it on a curve, on this curve, this red line here indicates the Pack River trestle? Was it on this curve or was it on the straight track on Pack River trestle (indicating on large map)?

A. Well, it was about the center; I guess that would be to the curve, wouldn't it?

Q. On the curve?

A. Somewhere near it.

Q. You would notice it more on a curve than anywhere else?

A. No, not unless the speed is fast.

Q. You would not notice it any more on a curve than on a straight line?

A. Not particularly.

Q. In other words, if the train was running sixty miles an hour over a straight line like this, and strikes this curve, you would not notice the speed any more around the curve than you would on this straight line?

A. Yes, sir, I would, certainly.

Q. That is what I am asking you, whether you would notice it more on a curve than a straight line.

A. I would not if they were only running thirty-five or forty miles an hour.

123 Q. But if they were running fast, you would?

A. Yes, sir.

Q. Therefore, if they were running fast, when you first noticed it on Pack River trestle, it was probably on that curve?

A. It was there or just a little afterwards.

Q. At any rate, it was there somewhere about the middle of the trestle?

A. It was there that my attention was first called to it.

Q. And when your attention was called to it there on the trestle you looked out there to see where you were?

A. Tried to, to see where I was located.

Q. And you found you were located somewhere near the middle of the trestle?

A. Near the middle of the trestle; the first indication I saw was a light coming off the trestle.

Q. Now, Mr. Caruthers, you are the same Mr. Caruthers who testified on the former trial of this case, last spring, aren't you?

A. Yes, sir.

Q. I will ask you if you did not testify last spring, on the direct examination by Mr. Voorhees, as follows: "Do you recall riding over the Pack River trestle on that run?" and you answered, "I do." "Will you say that there was nothing unusual in the speed that attracted your attention between Hope and Pack River trestle?" Answer: "Not that I recollect." Question: "Do you recall being on the Pack River trestle that afternoon?" Answer: "I do."

Question: "How do you recall that?" Answer: "From the
124 swing of the car as we came off the trestle." Question: "What attracted your attention to being on the trestle on that run?" Answer: "The swinging of the car, that first called my attention to it, and I looked to see what part of the trestle it was. I looked out of the windows and I observed the Pack River house there. Question: "Yes; what attracted your attention to the Pack River house?" Answer: "There was a light, that I remember." Question: "Now, when, if at all, was the speed of the train increased to a point where it attracted your attention, after the train had left Hope?" Answer: "It was coming off of the bridge." Question: "Coming off of the bridge?" Answer: "Yes, sir." You testified to that on the former trial of this case, didn't you?

A. Yes, sir.

Redirect examination:

Q. Now, you may state to the jury, Mr. Caruthers, when it was that the speed was increased, with reference to the Pack River trestle.

A. Why, it was increased as they came off of there, faster.

Q. And when you tell the jury that you noticed a swing of the car about the time you got to the middle of the Pack River bridge, state to the jury what you mean to be understood as saying about that.

A. Why, I mean that the car had begun to swing so it called my attention to it at that time. It was just after we passed the center of the trestle.

Q. Yes.

A. And of course it was only just an instant until we went off of the bridge.

125 Q. It was only just an instant until you went off of the trestle?

A. Yes. The trestle is only about a mile and a quarter and it was probably then only a half a mile, something like that, to the end of the bridge.

Q. Now, what did you mean to be understood as saying when you testified that your attention was attracted to the rate of speed as you were coming off the bridge. Now, what time did you include in that expression, "*coming off the bridge*"?

A. Why, that was the—I meant in that time the time that the mail-car went off.

Q. Yes.

A. And just at the same time I saw the light; the light is right at the end of the trestle.

Q. Yes. And where do you think you discovered the swing of the car and noticed an increase of speed with reference to the middle of the Pack River trestle?

A. Well, that was after we passed the center.

Q. It was after you passed the center?

A. Just as I have stated.

Q. And how far from that to the end of the trestle before you noticed a marked increase in the speed?

A. Why, I noticed the marked increase just as we came off; as my attention was called to that by the swing of the car; and also the exhaust of the engine, and sparks flying and so forth.

126 Recross-examination:

Q. Now, this Pack River house that you spoke of there is the section-house or section quarters beyond or west of the end of the bridge, isn't it?

A. I believe so; yes, sir.

Q. And about how far west of the end of the bridge?

A. As I remember it—I have never noticed closely—it is within 100 feet, I believe. I could not say positively to that, only I know it is right near the end.

Q. Do you want the jury to understand that you told the truth in this answer on the former trial of the case, "What attracted your attention to being on the trestle on that run?" Answer: "The swinging of the car, that first called my attention to it, and I looked to see what part of the trestle it was. I looked out of the window and I observed the Pack River house there." Was that true?

A. I just stated that I stood there for an instant or so; I did not see it at once, when I first looked.

Q. You did not?

A. No; but that was the first that I located myself.

Q. Well, did you tell the truth at that time when you said in answer to this question: "Now, when, if at all, was the speed of the train increased to a point where it attracted your attention after the train had left Hope?" Answer: "It was coming off the bridge."

A. I meant by that past the center of it.
Q. Oh, you meant by that when you were passing the center?
A. Yes, after——
127 Q. That is all.

(Excused.)

HARMON WICKERSHAM, testified as follows:

Direct examination.

(By Mr. C. S. VOORHEES:)

Q. Mr. Wickersham, please state your name to the jury.
A. Harmon Wickersham.
Q. Where do you reside, Mr. Wickersham?
A. I am living at present at Boise City, Idaho.
Q. Where were you residing on the 13th day of November, 1898?
A. I made my home in Helena, Montana.
Q. What was your occupation at that time?
A. I was working for the Northern News Company.
Q. The Northern News Company, on what road?
A. The Northern Pacific.
Q. On the Northern Pacific road; and what was your run at that time?
A. I was running between Helena, Montana, and Spokane, Washington.
Q. Between Helena, Montana, and Spokane, Washington?
A. Yes, sir.
Q. Were you on the west-bound train No. 1 out from Helena to Spokane on the 13th day of November, 1898?
A. Yes, sir; I was.
Q. Do you remember when that train reached Hope on that day?
A. Yes, sir; I think I do.
Q. What was the character of the run as to whether or not
128 the train was behind or otherwise, when it reached Hope?
A. My recollection is it was about three hours late, somewhere——
Q. About three hours late?
A. Yes, sir, about three hours late.
Q. And your business on that train was selling fruit and cigars and other things?
A. Yes, sir.
Q. To the passengers of the train?
A. I was supplied with a stock of goods by the Northern News Company that I was supposed to sell on the train.
Q. Where were you, in what portion of the train, when the train left Hope on that day?
A. I was in the smoking-car.
Q. In the smoking-car?
A. Yes, sir.
Q. And what had been your habit theretofore in working the train after leaving Hope on that run?

A. I made it a rule on leaving Hope to go through the train and finish up my work ready to get off at Spokane.

Q. Did you go through the train at any time on that run between the town of Hope and the town of Sandpoint?

A. No, sir. I did not leave the car between Hope and Sandpoint.

Q. Now, you may tell the jury why you did not leave the car. First you may tell the jury if you started to leave the car.

129 A. I was making preparations to go through the train.

Q. Yes. *And why did you* not complete those preparations and go through the train?

A. I was warned that it was not safe, and that some of the cars was not vestibuled, and that we were going to make an unusual fast run from Hope to Sandpoint.

Q. Now, did you sit down then in the smoking-car?

A. Yes, sir.

Q. As soon as you were warned?

A. Yes, sir, almost immediately; within just a short time I sat down in a seat in the smoking-car.

Q. Where did you sit down?

A. In the rear seat on the north side of the car.

Q. On the north side of the car; that would be on the right-hand side of the car?

A. On the right-hand side of the car.

Q. Coming toward Spokane?

A. Yes, sir.

Q. Do you remember Pack River trestle—are you acquainted with Pack River trestle?

A. Yes, sir; I know where it is.

Q. Do you remember that evening passing the Pack River station-house?

A. Yes, sir; I remember the Pack River station-house.

Q. How do you remember the Pack River station house on that occasion?

A. I noticed the light in the window.

Q. Where is the Pack River station-house located with reference to the west end of the Pack River bridge?

130 A. It is near the west end of the bridge; I cannot tell you how close—how near, but very close.

Q. Well, within two or three hundred feet, perhaps, a few hundred feet?

A. It is not farther than that I think, right on the bank.

Q. I will ask you if you remember passing the Pack River station-house?

A. Yes, sir.

Q. And how do you remember passing Pack River station-house?

A. By the light in the window.

Q. And after passing Pack River station-house, tell the jury whether or not you had any call by any passenger for service in your line.

A. Yes, sir; one of the passengers came to me and I got up to wait on him.

Q. Well, what was it he wanted?
A. Some pears.
Q. Wanted some fruit?
A. Yes, sir.
Q. And you got up to wait on him. When was that, Mr. Wickersham?
A. That was——
Q. (Interrupting.) With reference to the time of your seeing this light in the Pack River station-house.
A. It was just a short time after leaving the end of the trestle.
Q. Well, within what distance would you say?
A. It was within probably a mile.
Q. Within a mile?
A. Within a mile of the end of the trestle, I should think.
Q. Now, when you rose to respond to this call from the
131 passenger, state to the jury what the condition of the train was as to lateral motion?
A. Well, we just—the road is very crooked——
Q. Yes.
A. —and it was shaking about considerably, the train was.
Q. And what effect did that have upon you while you were waiting upon that passenger?
A. Well, it caused me to be sick.
Q. Caused you to be sick?
A. Yes.
Q. And what, if anything, did you do to allay that sickness?
A. Well, I have medicine that I carried for car-sickness. And I used that.
Q. You used that?
A. Yes, sir.
Q. Now, you may state to the jury how long you have been in the service of the Northern News Company.
A. Something over four years.
Q. And how long had you been at the time——
A. I started to work in——
Q. —of the accident, on the 13th of November?
A. Something over two years.
Q. Something over two years?
A. Yes, sir.
Q. How many runs would you make from Helena to Spokane and from Spokane to Helena in a month's time?
A. At that time I was making a round trip every three days.
Q. A round trip every three days?
A. Yes, sir. Ten trips a month.
132 Q. That would be ten trips a month?
A. Yes, sir.
Q. What was your familiarity with the character of the track between Hope and Sandpoint by reason of having passed over it a number of times?
A. Well, there is some very sharp curves in there.
Q. Well, you were familiar with it, were you?

A. Yes, sir.

Q. What was the character of the track from Hope to the Pack River bridge as to being crooked, straight or otherwise?

A. There are some very sharp curves between the east end of the Pack River bridge and Hope.

Q. And what was the character of the track as to being straight, crooked or otherwise, between the west end of Pack River station and the station of Sandpoint?

A. Well, for a couple of miles, two or three miles, there are some very sharp curves west of the Pack River bridge, very sharp curves.

Q. Do you know where the station of Oden is?

A. I know about where it is; yes, sir.

Q. After leaving Oden what is the character of the track?

A. There are not so many curves.

Q. Yes. Now, Mr. Wickersham, from your knowledge, your experience, traveling over that road the number of times that you have testified to at the point where you waited upon this passenger and became sick as you have described, what would be your estimate of the rate of speed at which this train was then running?

A. I should think it was about fifty-five or sixty miles an hour.

133 Q. Fifty-five or sixty miles an hour?

A. Yes, sir.

Q. Now, I will ask you if during the time that you have run on the Northern Pacific, you have had occasion to notice the rate of speed at this particular place that you have been testifying about on other occasions when the train was late?

A. Yes, sir.

Q. Now, you may state to the jury what the rate of speed on other days—days other than the 13th day of November, 1898,—what was the character of that speed when the train was late at this particular point that you have been describing, as to being faster or otherwise, than the schedule time?

A. It was usual when the trains were late to make up time, to make up their time between Hope and Sandpoint; along there because it was exceptionally a good piece of road, smooth, level. With the exceptions of these curves, it was a good piece of road. And they run exceptionally fast often when they were late.

Q. What is the fact as to whether or not at any time, at any other day you had noticed them making a speed as fast as upon the day that you have described—on the 13th day of November, 1898—at that particular point of the road?

A. I remember that distinctly as being the fastest trip I ever made over that part of the road.

Q. After being warned, as you have testified, that the run was going to be fast, between Hope and Sandpoint, when did you first notice the high rate of speed after leaving Hope?

134 A. Well, just before we got to the Pack River trestle; I noticed it was unusually fast.

Q. Did you work the train at all between Hope and Sandpoint?

A. No, sir, I didn't go out of the smoking-car at all.

Q. After leaving Sandpoint did you have any difficulty in working the train from there into Spokane?

A. I passed through the train a number of times.

Q. After the warning was given to you, and after you first noticed the motion, the oscillating motion of the car—tell the jury why it was that after that you did not undertake to work the train before you had reached the station of Sandpoint.

A. Well, it was because, as I have said, that it was—it is very difficult to stand up in the aisles when the train is going at a high rate of speed around these curves. And not only that but there was some of the cars not vestibuled.

Cross-examination.

(By Mr. THOMPSON:)

Q. Had you been through this train on this particular day before you left Hope?

A. Before I left Hope—yes, sir.

Q. You had been through the train. Did you go through the tourist sleeper?

A. Yes, sir.

Q. You noticed that that tourist sleeper was not vestibuled, didn't you?

A. Yes, sir.

Q. You noticed that it was not vestibuled. What attracted your attention to it that it was not vestibuled, when you went through it?

135 A. Well, there was none of the tourist cars vestibuled at that time.

Q. None of the tourist cars used by the Northern Pacific railroad at all that were vestibuled?

A. I am not aware of any.

Q. You never saw one that was at any rate?

A. No.

Q. And on this particular day you say the first thing that attracted your attention to the high speed was going around those sharp curves just before you got to the Park River trestle—after you left Hope and just before you got to the Pack River trestle, that was the first thing you noticed?

A. That was when I was warned.

Q. Well, had you noticed that they were running at a high rate of speed?

A. I began to think about it then. I noticed it before we got to the Pack River trestle.

Q. Well, did you notice it on a straight line, or did you notice it on these curves?

A. There is some sharp curves there.

Q. Those curves before you reach Pack River trestle are, some of them, very sharp curves, aren't they?

A. Yes, sir.

Q. And on an extremely sharp curve like that, you noticed it more than you did on other curves? That is correct, isn't it?

A. Yes, sir.

Q. Now, those curves just before you reach Pack River trestle are sharper than any of those curves after, aren't they?

A. I don't know that I could tell as to that.

136 Q. But you did notice *that they were very sharp* curves?

A. Yes, sir.

Q. Now, taking this black line marked here, as the railway line (indicating on large map), and this the town of Hope, and this the approach to Pack River trestle, and this the Pack River trestle—where are those extremely sharp curves that are on that line?

A. Somewhere within about a mile of the east end of the Pack River trestle.

Q. And you noticed that within, about a mile of the east end of the Pack River trestle, you noticed the motion of the train on those sharp curves?

A. Somewhere about there, I believe it was; yes, sir.

Q. Then did you notice the speed of the train on the Pack River trestle?

A. I don't know as there was anything that called my attention particularly to the rate of speed. I was sitting down in the seat.

Q. Nothing called to your attention, but immediately upon leaving the Pack River trestle you noticed the high speed again?

A. Soon after, just a short space of time.

Q. Whenever you would swing around one of the curves you would notice the speed of the train?

A. I don't mean to say that I noticed the speed of the train any more on the curves than on the straight lines.

Q. What would it be that you would notice?

A. The motion.

Q. The oscillation of the train as you would swing around curves?

A. Yes, sir.

137 Q. That is always noticeable in traveling, is it not? If you are going at a pretty good rate of speed—say, for instance thirty-five or forty miles an hour—and you are going over a perfectly smooth track in the high degree of condition, you don't notice the motion of the train, do you?

A. You don't notice it so much as you do in going——

Q. (Interrupting.) But if the train deviates from a straight line and swings around a curve the motion is immediately imparted to yo and you notice it, don't you?

A. Yes, sir.

Q. And it was these curves that attracted your attention to the motion of the train?

A. It was not the curves altogether.

Mr. VOORHEES: Speak out louder, please.

A. It was not altogether the curves; it was the rate of speed that we were running through those curves.

Q. What is it that causes train sickness in you? Is it the rate of speed, or is it the motion of the train as you go around curves?

A. It is the motion, I suppose, that causes car sickness in any one.

Q. It is the motion as you go around the curves, isn't it?

A. It is the motion, the motion of the cars.

Q. The oscillation of the cars. And that only takes place when you swing around curves, or go over a very rough piece of track; that is true, isn't it?

A. That is about it.

Q. You have been addicted to train sickness for a long time, haven't you?

A. No, sir.

138 Q. What were you carrying medicine for train sickness for?

A. I carried it to sell.

Q. What is that?

A. I carried it for sale.

Q. You carried it for sale to other people that were afflicted that way?

A. It was given to me by the Northern News Company.

Q. To sell to other people?

A. To sell on the train.

Q. So you took the risk of trying your own medicine?

A. I did that time, yes, sir.

Q. You did that time. You did not attempt to go through the train at all after leaving Hope?

A. No, sir, I did not.

Q. You state that the run from Hope to Sandpoint was the fastest run you ever made over this road?

A. Yes, sir, I think it is—I think it was; yes, sir.

Q. You know, as a matter of fact, do you not, that the railway track from Hope to Sandpoint, in so far as the condition of the track was concerned, was a very fine track at that time, wasn't it?

A. Yes, sir; apparently it was in good condition.

Q. And smooth except for the curves. And the run from Hope to Sandpoint was made at an exceedingly high degree of speed?

A. Yes, sir.

Q. You never saw it so fast before. Did they slow up after they got around those curves and came up on to this piece of level straight track from Kootenai towards Sandpoint, or did they run fast over that?

139 A. My recollection of that run was that the rate of speed was increased gradually out of Hope, till within a short distance of Sandpoint.

Q. When they went to slow up at Sandpoint station was the first time that the rate of speed ceased to be increased, wasn't it?

A. I don't know——

Q. As you recollect it?

A. As I recollect it, yes.

Redirect examination:

Q. You say that they were running fast all the way between Hope and Sandpoint. What do you mean by that? Do you mean that they were running faster than the schedule?

A. Yes, sir.

Q. Than the regular schedule.

A. Yes, sir; I am certain they were running faster than the regular schedule of time.

Mr. C. S. VOORHEES: I can scarcely hear you, Mr. Wickersham; please speak a little louder.

A. It seems to me—it seemed to me at that time that they were running a great deal faster than the regular schedule time; and I have no recollection of their slowing up, although they might have done it; I have no recollection of their slowing up.

JUROR: May I ask a question, as regards being warned? I would like to know who warned Mr. Wickersham. Who gave the warning?

A. The brakeman. The brakeman came into the car and he says—he says: "Wick, the best thing you and I can do is to
140 sit down on the seat and hold on, until we come to Sandpoint, because we have got orders to make up a certain amount of time between here and Sandpoint; and that is the best thing we can do, is to sit down here and hold on to the seat, because we are late."

Recross-examination:

Q. Mr. Lawrence was the brakeman that day, wasn't he?

A. I believe he was on the train; but he is not the brakeman I have reference to.

Q. Who was the brakeman?

A. The brakeman's name was Adams.

Q. Adams?

A. Yes, sir.

Q. What is Mr. Adams' name?

A. It is J. A., I believe.

Q. J. A. Adams?

A. Yes, sir.

Q. Where is J. A. Adams?

A. I cannot tell you anything about him.

The COURT: I could not hear what you said.

A. I cannot tell you where he is.

Q. Were you personally acquainted with him?

A. Yes, sir.

Q. How long had *he* been in the service of the company?

A. I had been running with him for something over two years.

Q. Where had he been working, what part of the train? Was he a rear brakeman or front brakeman?

A. He was head brakeman.

141 Q. Head brakeman. What business had the head brakeman back there?

A. What business had the head brakeman?

Q. Yes; what business had the head brakeman back there in that part of the train?

A. That is where he always rode, in the smoking-car.

Q. In the smoking-car? You were in the smoking-car, and he always rode in the smoking-car?

A. Yes, sir, when he was not attending to his work, he made it a rule to ride in the smoking-car.

(Excused.)

ALBERT ALLEN, testified as follows:

Direct examination.

(By Mr. C. S. VOORHEES:)

Q. State your name to the jury, Mr. Allen.

A. My name is Albert Allen.

Q. Where do you reside?

A. I reside in Spokane.

Q. What is your occupation?

A. Attorney at law.

Q. Were you acquainted with Jay H. Adams in his lifetime?

A. Yes, sir.

Q. Were you acquainted with him prior to the 13th day of November, 1898?

A. Yes, sir, for several years.

Q. I will ask you to state, Mr. Allen, if you were acquainted with the character and standing and capacity as a lawyer at the Spokane bar and the bar of the State of Washington of Mr. Adams in his lifetime?

A. I think so.

142 Q. State to the jury what it was.

A. It was very good.

Q. Did you see Jay H. Adams on the 13th day of November, 1898?

A. I did not.

Q. Did you see him on the 14th day of November, 1898?

A. I saw his body on that day.

Q. Whereabouts was his body when you saw it on that day?

A. It was very nearly seven miles this side of Hope, Idaho, on the bank of the lake, between the Northern Pacific Railroad track and the Pend d'Oreille lake.

Q. What is the character of the track as to being curved or otherwise at the point where you first saw the body?

A. It was opposite a curve in the track.

Q. Where were you standing, Mr. Allen, when you first saw the body?

A. I was standing on the railroad track, either on the railroad

track or on the embankment by the side of the track, just as we got off the caboose on the railroad.

Q. Where was the body when you saw it at that time?

A. It was lying, as I stated, on the lake shore, along the slope of the lake shore, between the track and the lake about, I thought at that time, seventy-five feet from the track.

Q. From the point where you were standing?

A. Yes, sir.

Q. And where was the body lying and how was it lying with reference to bushes or otherwise?

A. The body was lying on its left side facing the track, nearly parallel with the track, the head toward the west or in this
143 direction, towards Spokane, the feet towards the east, towards Hope, and the feet or legs were partially up on some bushes; the bushes appeared to have been bent over and the feet were lying on these bushes, the bushes holding the feet up probably eighteen inches, a foot or eighteen inches off the ground. I think he was kind of lying partly on his left shoulder and face, the left shoulder a little back and his face down on the ground or near to the ground.

Q. Who was present at the time that you found the body?

A. Mr. George Gabbart, the witness just on the witness stand, and yourself (Mr. C. S. Voorhees), Mr. Reese Voorhees——

Q. (Interrupting.) You misunderstand me When you first found the body.

A. Oh, when we first found the body?

Q. Yes, sir.

A. There was Mr. Pierce—I don't know what his first name is—he was prosecuting attorney of this county, and Mr. Gabbart, and W. J. McClure and Ignace Weill and Conductor Dykeman, I think his name is, a Northern Pacific freight conductor, and some of the train crew and some of the section men on the Northern Pacific road, at least, I understood them to be section men; I don't know their names.

Q. Where were you standing on the track at the time you first discovered the body as you have described with reference to the beginning of that curve; at what distance west of the beginning of that curve were you standing when you first saw the body?

144 A. Well, some little distance; I can't tell you exactly; I can't tell you how far it was. I was very near exactly opposite the body, yes, nearly exactly opposite the body; I can't tell you how far it was from the beginning of that curve. I know it was on the curve.

Q. What did you do or aid in doing after you first discovered the body?

A. I aided in taking up the remains and the body and putting it on the train and taking it to Hope and later——

Q. What did you find? Did you find anything on the ground at that time indicating where the body might have struck after leaving the car, starting from the point where the body was found?

A. Yes, sir; I found at the place where the body was found, right underneath his face was quite a lot of blood that had evidently

come out of his head, his face, then in a southeasterly direction, I should think, at least diagonally toward the track from that point some forty feet or over was quite a large lot of blood on the rather flat stones of the beach, quite a large spatter of blood; there was quite a good deal of blood there, and then at a point about twenty-five feet further still, in a southeasterly direction diagonally towards the track, were two large rocks setting in the ground sticking up out of the ground, one of them about a foot high, maybe a little more, and another one still larger standing off to one side, I should judge, about—well, probably they would not be over a foot apart at the nearest point of the two rocks, and then right between those two rocks and a little toward the railroad track from between them
145 was a small rock with a sharp corner sticking up out of the gravel, and upon this sharp cornered little rock was some flesh and a small piece of bone, a little blood; that is all I recollect there in the way of blood, and then a foot from that point right alongside of the smaller one of these two large rocks we found his spectacles with one of the glasses broken out of it, and a little, I should think about ten or twelve feet further in a southeasterly direction toward the railway track, diagonally, in the same line, these other two spots were from the body; over further to the southeast we found three little bits of spatters of blood, just a drop, three little drops, that evidently had struck the rocks, the flat rocks, and spattered in the direction toward his body; and right over these three little spatters of blood we found a ten cent piece. Then taking the line of these blood spots from his body, following that line out of the track we found his hat still further to the east alongside of the railroad track, and below the embankment, I should judge about thirty feet further east than the point where that line would come to the track.

Q. How far would you say it was, then, from the point where these blood spots—spatters, as you expressed it—westward to the railroad track?

A. In a direct line?

Q. Diagonally.

A. Diagonally, in the line of the spots of blood, I should judge it was from thirty to forty feet; I can't tell you exactly, because I did not at that time make any measurements of those spots, but
146 I should say it was thirty or forty feet; it would be nearer than that to the track, at right angles to the track.

Q. What conclusion did you reach as to the distance of the body, where it was found quiescent through these points that you have described to the point where that line, that diagonal line would intersect the railroad track?

A. You mean from the point where the body was found?

Q. Yes, sir, following on the line of these indications?

A. I thought at the time it was about one hundred feet.

Q. Now, from the point where the body lay to the point, drawing a line at right angles with the track—to that point from a point direct—how far would it be from the body to the track, what you thought at that time?

A. I thought at that time about seventy-five feet; I afterwards helped to measure it and found it to be sixty-four feet.

Q. Now this curved line would represent the curve; this will represent the body——

Mr. THOMPSON: Make your points in such a way that it can go into the record. We cannot tell what this is.

Mr. C. S. VOORHEES: I want him to explain to the jury exactly what he means by right angles, and that is the only point I am getting at, because we have a diagram which Mr. Allen knows nothing about, and which will subsequently go into the record.

147 Q. Will you please indicate upon that paper to the jury the point where you found the body?

A. These two lines on the map.

Mr. THOMPSON: Do you intend to put that paper in evidence?

Mr. C. S. VOORHEES: No.

Mr. THOMPSON: Then we object to his indicating anything to the jury if it is not to go in evidence in the case.

Mr. REESE VOORHEES: By way of illustration; to make his testimony clear.

Mr. C. S. VOORHEES: I think the witness has a right to illustrate his testimony in that way.

The COURT: The witness has the right to illustrate, but every illustration that is made ought to stay in as a part of his testimony.

Q. You may mark with a letter the place where you found the body with reference to that curved track, that curve beyond.

A. I will make a letter "X" at that point there.

Q. Now, indicate on that paper where you first found indications of blood.

A. You mean from the body, going towards the track?

Q. Yes, from the body going towards the track. Draw a line from the body toward the track through the points where you found blood.

A. This line that is already drawn here will fairly illustrate it I think. I should say that the next nearest blood spots toward
148 the railroad from the body would be at about this point, letter "O."

Q. Now, after that where did you find any?

A. The next was at the point of the three rocks here. I will make that "P."

Q. Now, was there anything between letter "P" and the railroad track?

A. Yes, sir; the three little small spatters of blood here at letter "C," three little drops of blood.

Q. Now, draw a line from "X" at right angles with the track.

A. That is what I call at right angles to the track; I mean the nearest point to the track from the body.

Q. How far did you estimate it at that time from "X" to the railroad track in a diagonal line?

A. I thought about one hundred feet in a diagonal line.

Q. Through the points "O," "P," and "C"?

A. Yes, sir.

Q. How did you estimate it from "X"—put a letter here—"X" to "Z" on a line drawn at right angles.

A. I estimated it at that time, without attempting to measure it, at seventy-five feet. I afterwards helped measure those points and got the distances more correctly. There is an embankment along here like that, and the hat was lying right there (referring to diagram).

Mr. THOMPSON: At what letter?

A. "H."

Q. That was on the morning of the 14th of November, 1898?

A. Yes, sir.

149 (Plaintiffs offer diagram in evidence. Received and marked Plaintiffs' Exhibit "B 1.")

Q. That you made these observations that you have been detailing to the jury?

A. Yes, sir.

Q. Did you ever see the *locus in quo*—the point of the accident—at any time subsequent to November 14th, 1898?

A. Yes, sir, I passed along over the railroad track several times, passed the point, and then I think it was on the 25th of March, 1900, that I went there with yourself (Mr. C. S. Voorhees), and your brother, Mr. Reese Voorhees, and Mr. Gabbart, and Mr. Oscar Bowen, and examined it again.

Q. And did you point out to Mr. Oscar Bowen any of the points that you have detailed and described to the jury as having observed them there on the 14th of November, 1898?

A. Yes, sir; I think I pointed them all out to him.

Q. What did Mr. Bowen do there at that time, just generally?

A. Mr. Bowen measured those distances with my assistance.

Q. Measured them with the data which you furnished him?

A. Yes, sir.

Q. Which you pointed out to him?

A. Yes, sir; the data which I myself furnished him and some of the others helped to furnish. We were all there together; Mr. Pierce, I think, was there with us the second time, and he was there also on the 14th of November when we found Mr. Adams' body.

150 Q. In what way did you aid, if you did aid, Mr. Bowen in making those measurements?

A. I helped him make the measurements.

Q. Do you recall now what the measurements were? Do you recall how far it was from the point where the body was found here at point "O" to the point where that diagonal line intersected the railroad track?

A. Yes, sir; it measured one hundred and eight feet.

Q. How far did the measurements show it was from the railroad track, the point where that diagonal line intersected the railroad track, to the first indication of blood upon the rocks in that line?

A. You mean the three little dots?

Q. Yes, the first indication that you observed.

A. I don't recollect now that Mr. Bowen and myself made any measurements as to the three little spots of blood but we did make a measurement to the point where the three rocks were.

Q. To the sharp rock?

A. Yes, sir; and my recollection is that on that diagonal line, that point was, as near as we could measure it, fifty-one feet from the track on the diagonal line; it would be nearer to the track at the nearest point however, opposite.

Q. Did you measure from the point where the sharp rock was found to the next point in that diagonal line towards the body?

A. No, sir; because at the time we were there all of the blood spots were gone, and I could not identify correctly the large spots of blood that were next toward the body from the rocks.

151 Q. From the fifty-one foot point, did you measure to the point where the body was found?

A. Yes, sir; they measured that distance; the whole distance, as I stated, was one hundred and eight feet and the point where the rocks were was fifty-one feet.

Q. When you found the body, did you make an estimate as to the distance from the blood that you found at that sharp rock which you have now said was fifty-one feet from the railroad track in a diagonal line towards the body—from that point did you estimate the distance to where the body lay, at the time you found the body?

A. No, only I recollect thinking that it was about fifty feet, but I did not——

Q. Did you estimate from the fifty-one foot point which you have described to the next point of blood on the diagonal line between that point and the point where the body was at the time you found the body?

A. Yes, sir, I recollected then and have thought about it a great many times since, and my judgment is that it was about twenty-five feet from the point where the blood and bone was found on the rocks to the next spot of blood towards where his body lay.

Q. You made no special examination of the body, did you?

A. No, sir; I was present, however, when the coroner made somewhat of an examination of it, not to make any personal examination.

Q. You may describe to the jury the injuries as you saw them.

152 A. About the only injury that I detected at the time I saw him was right over one eye. I declare I can't tell you now which eye it was, but it was one of them; there was quite a deep gash, cut, right across here, kind of mashing this part of the eyebrow down over the eye, cutting open the front part of the forehead here (illustrating). I won't say now whether it was over the left eye or the right eye.

Q. Do you remember making any observation at that time as to the condition of the hand?

A. No, sir, I did not; I did not notice. I think I noticed that

there was some little blood on one of the hands, but I did not make any close examination.

Q. After that, what, if anything, was given to you by anybody connected with the Northern Pacific as having belonged to Mr. Adams and having been found at the point of the accident?

A. Sometime afterwards, I can't tell how long it was, some one of the train crew—I think it was some one of the men that were there at the time that the body was taken up by us, met me on the street corner here in Spokane at the corner of Riverside and Howard, and showed me a broken ring with the set gone out of it, that he stated——

Mr. THOMPSON: We object to that.

The COURT: Never mind what he stated.

A. (continued.) And he gave me the ring and I gave it to, I think, Mr. Bowman, or else Mr. Frank Adams; I am not certain which, but I think Mr. Bowman.

153 Q. Do you remember the condition of the ring?

A. Yes, sir; it was broken on this part of it here, opposite where the set was in.

Q. And what was the condition of the front part of the ring as to there being a set there?

A. I stated the set was gone out of it; it had had a set in it, but the set was gone.

Q. Now, Mr. Allen, I will ask you if you made any measurements or aided in making any measurements on the 25th day of March, 1900, from the point at which this diagonal line that we have been talking of drawn from the body through these blood-spots would intersect the railroad track—from that point to the beginning of that curve, that would be measuring eastward from the point on the track intersected by this diagonal line?

A. I counted the rails on the 24th of March, 1900; I counted the rails from a point opposite the body——

Mr. THOMPSON: You mean the 25th, do you not, of March?

A. 25th, yes, I think it was I counted the rails on the track from a point opposite where the body was found back to the six-mile post this side of Hope, and I also counted the number of rails it was back to the beginning of that curve, but my memory has lost the number of rails it was back to the point of that cur-e. I thought I had made a memorandum of it, but it seems that I did not keep the number in my memory, the number of rails it was back beginning in the point of the curve.

Q. How far was it from the point intersected by this diagonal line back to the six-mile post?

154 A. My recollection is it was sixty-nine and three-fourths rails; something like that.

Q. Did you count from the beginning of that curve—did you make any measurement from the beginning of the curve back to the next curve to determine the length of the tangent, the straight line leading up to the curve opposite which Mr. Adams' body was found?

A. No, I did not make any division of my measurement or counting.

Q. You say you counted the rails?

A. Yes, sir.

Q. Have you had any experience in railroading?

A. Well, somewhat; yes, sir; that is, I have been attorney for railroads for quite a number of years.

Q. Do you know the length of standard rails?

A. Yes, sir.

Q. What is the length?

A. Thirty feet.

Q. And what is the fact as to these being standard rails or otherwise that you counted?

A. They were standard rails in length.

Q. What has been your experience in traveling over the Northern Pacific, Mr. Allen, during the last eight or ten years?

A. In what particular?

Q. Have you traveled some over the Northern Pacific?

A. Yes, sir, quite a bit.

Q. Are you familiar with the practice of the Northern Pacific in running dining-cars upon its trains?

A. Yes, sir.

Mr. THOMPSON: We object, your honor, unless that is limited to the time at which this accident occurred.

155 Q. At and prior to the 13th day of November, 1898.

A. I had more experience prior than I have had since.

Q. And what was the practice of the Northern Pacific as to permitting passengers to pass through a train, going to and from the dining-cars when the dining-cars were in service?

A. Passengers were in the habit of going back and forth to and from the dining-car without any objection as far as I ever learned in my experience.

Q. What was the fact as to that practice in operation when the train was in motion?

A. There was no difference between it in going in the dining-car when it was in motion than when it was standing still.

Q. What was the fact as to that practice being in operation at times other than when meals were served?

A. The dining-car was always open for cigars and liquid refreshments, excepting in the night-time after the employees would retire; then usually the dining-car was open and people passed through it; they did not serve any refreshments, as a rule, after the employees went to bed.

Q. During your travels, Mr. Allen, has your attention been arrested by the device known as the vestibuling of cars?

A. Yes, sir; I have seen them frequently.

Q. Prior to the 13th day of November, 1898?

A. Yes, sir.

Q. To what extent was that vestibule device in use within your

traveling experience on the Northern Pacific and upon other roads upon which you have traveled?

156 A. Well, I know that long prior to that time the Pullman cars were usually always vestibuled and some of the day-coaches; just how many of them I could not say that I know, because I did not pay strict attention to it.

Q. How long prior to the 13th of November, 1898?

A. For some five or six years.

Q. Can you describe to the jury this vestibule device?

A. Well, there are two kinds, but I think the style that was on the Northern Pacific was a frame built on each side of the platform from the end of the car—that is, end of the body of the car out to the end of the platform, and just at the top of the steps as you go up into the car and a door enclosing the entrance where the steps are; in other words, the door opens and you can go up and down the steps; when the door is closed you cannot go up and down the steps. Then the frame is also open on the end to make an entrance into the next car. When the two cars are together this entrance is open from one car to the other but the sides down the steps are enclosed by this door. Now, that is the Northern Pacific style, as I recollect them. While some trains on other roads—and possibly on some of the Northern Pacific—the vestibule is built out flush with the side of the body of the car, and a small platform lets down and covers the steps, and the door is then closed over the platform so that it makes a flush clear up to the side of the car in the vestibule, and then with an entrance away from the middle of that vestibule into the next car. That is as I recollect them. Now,

157 I do not say that the Northern Pacific had any of those wide vestibules with the sides of the vestibule out flush with the car, because I am not positive about it.

Q. As you have described this vestibule, the effect of it is to entirely close the platform when the doors were closed?

A. When the doors were closed the platform is enclosed, excepting to get into the car through the door or to go from one platform through the platform to the next car. Then they are always open going through, but are not open to the outside; they are simply open so you can pass through from one car to the other; the sides are entirely closed.

Q. When the sides were enclosed it would not be possible for anyone to fall off?

(Defendant objects. Objection sustained.)

Q. What is the effect of that vestibule device when the doors are closed and the device is in place as to the safety of a passenger in passing between the cars and across the platform?

Mr. THOMPSON: We object to the witness giving his opinion upon that. The situation he can describe, and the other question is for the jury.

(Objection sustained. Plaintiffs except.)

Q. The only exit as I understand, Mr. Allen, when the vestibule

device is in place is the exit that enables one to pass across the platform from one car to another. Is that what you say?

A. Yes, sir.

Q. You may state to the jury what the general character of
158 the ground was when you saw it on the 25th of March, 1900, and when you saw it on the 14th of November, 1898.

A. It was the same, with the exception that when I was there on the 25th of March, 1900, somebody had been doing some digging along the base of the embankment, just at the foot of the riprapping to the grade, had graded out a place there probably a hundred feet long and a few feet wide, digging first the rocks and earth out and throwing it out down to the lake a little. What the purpose of it was I don't know, and how it came I don't know.

Q. Aside from that, what was the condition of the ground on the 25th of March, 1900, as compared with it on the 14th of November, 1898?

A. With the exception of this little digging, this was only a few feet wide, this digging that had been made was only a few feet wide and aside from that the bushes and the rocks and other things were the same excepting that in this digging they had covered up these three rocks where the little piece of bone and the flesh was on a small rock between the two.

Q. From the track down to the bottom of the embankmen-, what was the character of the ground?

A. The same as it was when I was there on the 14th of November, 1898.

Q. And what was its character as to being rocky or not?

A. It was rather a steep embankment, built out of large heavy rocks and steeper than the usual riprapping; it looked to me
159 as if it was built up of heavy rocks laid one upon the other and fitted in. It was not masonwork, but tolerably steep, so much so that it going down over it you would have to be careful to get your toes and heels between the rocks and hang on to the rocks some to keep from falling.

Q. From the bottom of that embankment down to the point where the body was found what was the character of the surface?

A. It was the ordinary lake-bed with wash gravel upon it and no soil. That is I say no soil, very little soil. There were a few bunches of small bushes growing here and there over it in some places.

Q. What was the fact as to whether or not between the bottom of the ri-rap embankment that you have described out to the point w'ere the body was there was broken rock?

A. There were some broken bowlders of rock, some quite large bowlders, and some places where there was nothing but small, rather flat-washed, worn bowlders, small bowlders and gravel, coarse gravel.

Q. What is the fact as to whether or not there was a bush or bushes at the point where you have described the pointed rock at which the piece of bone was found?

A. There may have been some very small bushes near there, but not in the immediate vicinity of them; they were comparatively in open ground.

160 Cross-examination.

(By Mr. THOMPSON:)

Q. Mr. Allen, at the time you went there and made those measurements, you had a photographer with you, didn't you?

A. I think we did.

Q. Do you remember who he was?

A. No, I do not. I thought it was Mr. Bowen; I would not say now. Somebody had a kodak, anyway.

Q. And some pictures were taken there while you were there?

A. They took some, but it was a very cloudy day, and I don't know whether they got anything they could make a photograph of or not.

Q. Didn't you see the pictures exhibited here at the last trial of the cause?

A. I did not.

Q. Now, you thought it was proper for passengers upon the Northern Pacific railroad two years ago, in traveling upon the trains, when they wanted to go into the dining-car to get cigars or anything on that car to simply get up and go through the train and go into the dining-car and get them, whether the train was in motion or not?

A. Yes, sir.

Q. Is that correct, Mr. Allen?

A. Yes, sir.

Q. Now, was that the practice generally of passengers, or only certain passengers?

A. It was the practice, so far as my observation was concerned, with anyone who wanted any refreshments in the dining-car.

161 Q. How many persons did you ever see go to the dining-car when the train was in rapid motion to make a purchase of that kind?

A. Well, I can't—you speak of rapid motion. I don't know that I ever saw anyone hesitate to go because the train was in motion. But I know it is quite common for people to go there and get what they want whenever they want it.

Q. As a matter of fact, that practice of passengers in going through a train when the train is in motion depends very much upon how familiar the traveler is with the trains, does it not? In other words, with a traveler who is very familiar with travel, travels a great deal on the train, does not hesitate to make such trips, while travelers who travel very little very seldom go through a train that way when it is in motion?

A. I can't say that, Mr. Thompson.

Q. You don't know what the fact is in that matter?

A. No, I don't think it is confined to people who travel a great deal and are accustomed to travel; some frequent dining-cars more than others and go oftener than others, but I don't think there is any difference between them if they want something to eat.

Q. You don't think that familiarity with that kind of danger, if it is such, breeds contempt, as in other cases?

A. I don't know as it does.

Q. Now, Mr. Allen, you say that you knew Mr. Adams well in his lifetime?

A. Yes, sir—well, I can't tell exactly when he came here,
162 but my recollection is that he came here along about 1890, and I had known him from that time until his death, but I might be mistaken a year as to when he came.

Q. You and Mr. Adams were thrown together a great deal in your practice as railroad attorneys, were you not?

A. Yes, sir.

Q. You were both attorneys for the Spokane Falls & Northern Railway line for a number of years, were you not?

A. Yes, sir; for four or five years.

Q. And up to the time or about the time of Mr. Adams' death, or just before that?

A. I think he ceased to be attorney for that road on the 1st of September; he was killed the 13th of November.

Q. During the time he was attorney for that road, he was also attorney for the Nelson & Ft. Shepherd road and for the Red Mountain, the branches of that road, was he not?

A. Yes, sir; we were both attorneys for the Spokane Falls road and those three roads which you have mentioned, which are really a part of that system.

Q. Mr. Adams was also for a great many years and up to a short time before his death attorney for the Great Northern railway, was he not, located at Spokane?

A. Yes, sir, for some years, up to about a year, I think prior to the time of his death; I can't tell you exactly when.

Q. You don't know how many years that was?

A. My recollection is he was attorney for the Great Northern some three or four years; I can't tell you exactly.

163 Q. And during that time you know as a matter of fact that he attended to all of the Great Northern railroad's business within his jurisdiction here in Spokane and up and down the road?

A. Well, he attended to a great deal of it. I think he had at times, like all other local counsel, some assistance from the general counsel of the road.

Q. He also made many trips over the Spokane Falls & Northern road, did he not?

A. He made quite a number, yes, sir.

Q. That road was a road that had no vestibuled cars at all, did it?

A. None that I ever saw.

Q. Now, you say that the Northern Pacific road at that time had some vestibuled cars on its line that were in use?

A. Yes, sir.

Q. The sleeper—what is called the first-class sleepers—were perhaps all vestibuled at that time, were they not?

A. I think the sleeping-cars and the dining-cars and the regular first-class day-coaches, I am very positive, were all vestibuled.

Q. You think all of the day-coaches were vestibuled?

A. When I say all, I speak of what is called the first-class cars, where there is no smoking allowed in them.

Q. Now, what was the fact as to whether all of the smoking-cars, or only a portion of them, were vestibuled at that time.

A. I can't tell you; my impression is that some of those cars—that generally only near the head of the train, near the smoker, some of them at times were not vestibuled, but——

164 Q. Well, then, at that time none of the cars known as tourist sleeping-cars, were vestibuled, were they?

A. I could not say as to that.

Q. You never saw any that were, did you?

A. I could not say whether they were, or whether they were not. I never took particular notice of them. As I say, the last that I recollect about it is that there were some cars or car near the head of the train usually that did not have a vestibule on them, but just which ones they were I don't know, whether it was the smoker or the tourist.

Q. You did not pay any attention to it?

A. Not particularly, no sir; yet I have been through.

Q. When you would go through them and go back to the dining-car would you notice that the platform was not vestibuled?

A. I don't know that I would. I say I got the impression in some way from my traveling back and forth that some of those cars at the head of the train near the smoker were not vestibuled, but which ones they were I cannot say.

Q. Was there any difficulty in determining whether a car was or was not vestibuled in passing through it?

A. I suppose there would not be, if a fellow would look at it.

Q. Even if he had his eyes shut one would be attracted, would he not, by the sound and wind?

A. I think he would by the sound, yes, sir.

Q. In what way by the sound?

A. I don't know that he would detect it by the sound, but
165 I think he would by the blast of the wind when it would strike him as he would get outside of the door.

Q. And that would be true whether the wind was actually blowing or not, would it not?

A. It is usually blowing some when the train is in motion.

Q. It is not the wind blowing, it is the motion of the train into the wind, is it not?

A. I suppose it is, but nevertheless it is wind; it seems the same as wind.

Q. The effect is the same as if the wind was blowing and a train were standing still?

A. Yes, sir.

Q. Now, coming out of an enclosed car and on to an open platform, the sudden crash of sound when you get into the open air is perfectly apparent, is it not?

A. Yes, sir; usually.

Q. And your attention would be attracted in that way in coming out on an open platform, would it not?

A. I think so generally.

Q. Now, you say that Mr. Adams' standing was very good as an attorney at the bar?

A. Yes, sir.

Q. You have had a good deal of experience with him in the trial of causes, haven't you?

A. Yes, sir.

Q. Do you recollect the trial of the case of Lane against the railway that you and Mr. Adams took part in?

A. Yes, sir, I do.

Q. Do you recollect having conversation with Mr. Will H. Thompson shortly after that action was tried with reference to Mr. Adams' character and ability as a trial attorney?

166 A. Yes, sir; I had a little conversation with you.

Q. I will ask you if you did not state in that conversation that Mr. Adams was the poorest trial lawyer you ever saw?

A. I don't think I used that language. I said something in the nature of that, however.

Q. In substance that, was it not, Mr. Allen?

A. Yes, sir. I would like to explain how I came to say that.

Q. I will let you explain it presently when I find out whether you said that. Didn't you say, in substance, that you thought that Adams was the poorest trial lawyer that you ever saw in your life?

A. No, sir. I said it seemed to me that he had hard luck with his cases, or as hard luck as anybody as I had ever seen, or something like that; yes, sir.

Q. And didn't you say in substance, Mr. Allen, that he was the damnest, poorest trial lawyer that you had ever seen in your life?

A. I think I said he had the worst luck of any lawyer I ever saw. I am not positive of the language. As I said it I was mad at the time, and was I talking to you as a confidential friend at the time, and did not suppose it was ever going to come up.

Q. And you think now, in your cool moments, that it was all luck, and not trial ability?

A. No, sir, I don't. No, sir; I think we were having a run of very hard cases. We were defending the railroad, the Spokane & Northern in some very hard cases, and I was very much dis-

167 satisfied at the time by the luck which Mr. Adams and I had had in the trial of the Lane case, and there were some things that occurred in the trial of the Lane case that I did not agree with Mr. Adams and the president of the company as to what should be done in the matter, and I was attributing our failure in that case to those things.

Q. Now, I will ask you, Mr. Allen, to be perfectly fair with us, if you did not say to me also in that conversation in substance this, that a ten-year-old boy could have tried that case better than Adams tried it?

A. I didn't think I ever used that expression.

Q. Didn't you further say that no lawyer who had a head on him would have ever put in the evidence that Adams put in in that case by way of cross-examination?

A. No, sir; I don't think I stated that. I stated I was opposed to putting in certain evidence there, and that I thought it injured the case.

Q. Now, Mr. Allen, on the 14th of November, when you went out over the line of the Northern Pacific railroad and found Mr. Adams' body and saw indications of blood in spots, where something like blood was upon the rocks, you made no measurements?

A. Not on that day, no, sir; I did not attempt to make any.

Q. On March 25, 1900, about a year and a half after that is when these measurements were made?

A. Yes, sir.

Q. During that time do you know, or do you not know, that the floods of spring and fall had lifted the level of the lake until it washed along the foot of the railroad embankment at that point?

168 A. It may have been up there during the extreme high water.

Q. Didn't you see evidences at that time of that fact by the fact that sand had been washed in?

A. No, sir; there was a place down on a point a little further to the east that looked to me on that occasion as though there had been some sand drifted in there, but at the point where the accident happened—where his body was found—there was no indication of any sand or sediment or anything being left there by the water that was not there at the time of the accident.

Q. At any rate, the blood spatters that you had observed had been obliterated, had they not?

A. Yes, sir.

Q. And nowhere did you see any signs of blood?

A. No, sir.

Redirect examination:

Q. Mr. Allen, you may state why it was that you were angry with Mr. Adams in connection with the manner in which the Lane case was tried?

A. It was because Mr. Corbin and Mr. Adams had insisted upon putting——

Q. (Interrupting.) Who was Mr. Corbin?

A. Mr. Corbin was the president of the Spokane and Northern Railway Company.

Q. Spokane Falls & Northern?

A. Yes, sir.

Q. And it was the case of Lane against what railroad company?

A. Lane against the Spokane Falls & Northern Railroad

169 Company. They had insisted upon putting in some testimony in reference to Mrs. Lane's character, and I opposed the putting of that testimony in on the ground that I thought it was a dangerous thing to put in the case where a woman was plaintiff. The jury in that case returned a heavy verdict against us, and I was feeling very sore at the time the trial ended about the luck we had had in the case, and I made some remarks to Mr. Thompson,

which, if I had ever supposed would have come out, I would not have made, or if I had waited a day or two until I got over being mad, I never would have said, and notwithstanding what I said there, I still say that Mr. Adams was a good lawyer in every respect, excepting that he missed his judgment sometimes in some respects, like all other lawyers.

Q. In putting that testimony in by Mr. Adams, when he put that testimony in what was the attitude of Mr. Corbin, the president of the road, as to whether or not that testimony should go in?

A. It was his desire that the testimony go in.

Recross-examination:

Q. Mr. Adams also insisted that it should go in, didn't he?

A. Yes, sir, but whether from his own judgment or because Mr. Corbin wanted it I never could tell.

Q. Now, Mr. Allen, you stated that if you had waited for a day or two until you got over your pet you would not have said such a thing. As a matter of fact, it was said when you and I were preparing a brief, when we were preparing the case on appeal,
170 and ninety days after that case had been finally wound up and the motion pending for a new trial had been overruled and a judgment entered, and we were preparing a brief for the Supreme Court, were we not?

A. I don't think it was so long after that; it was quite a while after the trial before the brief was prepared, and my recollection is that this conversation that we had was very shortly after the trial of the case. You (Mr. Will H. Thompson) were present here at the time, a portion of the time, when the case was being tried, and I had some talk with you about the evidence at the time it was being put in, if I recollect right, but this was later, the conversation that I had with you was still later than that, however.

Q. It was during the time that we were preparing the brief in your office, was it not, Mr. Allen?

A. It may have been at the time we were preparing some of the papers for a motion for a new trial or for appeal in some way, but I don't think it was when we were preparing the brief, because that was a good while afterwards.

Q. Before the Spokane Falls & Northern railroad came under the control of Mr. Hill, and before I had anything whatever to do with the case, the motion for a new trial had been overruled, and the judgment entered and all your preliminary motions made, had they not, Mr. Allen?

A. Yes, sir, but my recollection is, Mr. Thompson, that this conference—I may be mistaken about it, but my recollection is
171 that this conference was had with you before you came in as the attorney for the Spokane Northern, because you were here at the time of the trial and here quite a bit different times afterwards, and I can't tell you now just what time the conversation was, but my recollection is it was very shortly after the trial.

Re-redirect examination:

Q. Within your traveling experience, Mr. Allen, state what the fact is as to whether or not you have ever observed ladies and children passing backwards and forwards across the platform in going to and returning from the dining-car?

A. Yes, sir; it is customary to do that at meal times.

Q. Now, you were asked whether or not the crash of the wind would advise a man that the car was not vestibuled. Within your experience, would the crash of the wind and the blow of the wind across the platform carry any indication to your mind or to the mind of anybody else that the platform was unguarded, ungated, or unbarred?

A. Not necessarily; if it was guarded with the railing as some of the cars there, the wind and noise would be just the same as if it had no railing on.

Q. The same way with gates, would it not?

A. Yes, sir.

Re-recross examination:

Q. You noticed that women and children on the Northern Pacific trains went to the dining-cars when the train was in motion just the same as grown people and men?

A. Yes, sir.

172 Q. You never saw any of them fall off?

A. I never did.

By a JUROR:

Q. I would like to ask you, Mr. Allen, if you know if Mr. Adams' body had been discovered by any other party at the time you discovered it—prior to the time that you discovered it?

A. Some of the section men on the railroad there were watching it while we got there the morning of the 14th.

Q. They had found it, then, first?

A. Yes, sir; but from the appearance of the body and the blood that had oozed out of his mouth and hanging from the mouth to the rock below, I should say, in my judgment, that the body had not in any manner been disturbed from where it had lain when it ceased to roll on the beach.

(Re-recross resumed:)

Q. That would be true unless the body had been removed very shortly after it fell?

A. Yes, sir.

Mr. C. S. VOORHEES: I had in mind a moment ago to ask you, Mr. Allen, to state to the jury what, if any, examination you made of Mr. Adams' pockets at the time you found the body there by the track?

A. We made no examination while I was there at the time at the ground, excepting that I noticed that he had two cigars in his vest pocket; they were still in the pocket.

Re-redirect examination:

Q. Did you make any observation at that time as to his watch?

173 A. The watch was still upon his person and in his pocket, his vest pocket at the time. Later, when the coroner made an examination, my recollection is that he took the watch and a pin and a necktie.

Q. You were present at that examination, were you?

A. Yes, sir; the coroner took those things and gave them to me, and I brought them and gave them to Mr. Bowman, the nephew, I think, of Mr. Adams, here in town.

Q. Now, what things were they?

A. My recollection is now there was a watch and this pin and a necktie.

Q. Describe the pin; what character of pin was it?

A. When the pin was given to me it was dark or partially dark in the car, and the poor light, and the coroner tore the necktie off and handed it to me with a pin. When I received the pin I thought it was some little scarfpin, but it proved to be afterwards the stud that belonged in his shirt, that had been pulled out, and in pulling it out the spiral had been straightened out.

Q. What was the character of the pin, the setting of the pin?

A. It was a diamond pin, as I understand it; I did not examine it closely to see whether it was a diamond or not. I gave it to Mr. Bowman—I gave him the hat and the ten cent piece and this necktie with this pin sticking in it, and the watch and chain, is my recollection of what I gave to Mr. Bowman.

(Excused.)

174 JOHN A. PIERCE, testified:

Direct examination.

(By Mr. C. S. VOORHEES:)

Q. State your full name to the court, Mr. Pierce.

A. John A. Pierce.

Q. Where do you reside?

A. In Spokane.

Q. What is your occupation?

A. Attorney at law.

Q. Were you residing in Spokane on the 13th of November, 1898?

A. I was.

Q. Practicing your profession?

A. I was; yes, sir.

Q. At that time what official position, if any, did you hold?

A. Prosecuting attorney for the county.

Q. Spokane county?

A. Yes, sir.

Q. Did you have occasion to leave Spokane, Mr. Pierce, on the morning of the 14th of November, 1898?

A. Yes, sir; I took the overland east-bound train.

Q. Overland east-bound train? Did you leave the overland east-bound train at any point short of your destination?

A. Yes, sir; I left it at Sandpoint.

Q. You left it at Sandpoint?

A. Yes, sir.

Q. And why did you debark from the train at Sandpoint?

A. Well, after boarding the train, I learned that Mr. Jay H. Adams was missing

Q. Were you acquainted with Mr. Jay H. Adams in his lifetime?

A. Yes, sir.

Q. How long had you known him?

175 A. At that time I should say about eight years, some where in that neighborhood.

Q. You learned that Mr. Jay H. Adams was missing; and after having learned that, what was it induced you to leave the train at Sandpoint?

A. Well, I met Mr. Albert Allen and Mr. Gabbart, I think—George Gabbart on the train, and they were looking out of the back end of the train to see if they could find any trace of Mr. Adams.

Q. From Spokane to Sandpoint?

A. Yes, sir; started shortly after leaving Spokane. And I stood with them on the rear end of the train, and assisted in watching on one side of the track. At that time I think they did not know whether he had fallen off or not. It was the supposition that he had fallen from the train. We watched all the way up to Sandpoint, and there learned from some of the railroad men that a body had been found somewhere near the Pack River station, about nine miles from Sandpoint; and the supposition was it was Mr. Adams' body. So we all got off at Sandpoint, and listened to the narrative of finding a body there. And at Mr. Adams' (Allen's) request I stopped over to assist.

Q. At Mr. Allen's request?

A. At Mr. Allen's request I stopped over on the trip to assist in recovering the body.

Q. After you left the overland passenger at Sandpoint, state what you did with reference to proceeding to the point where Mr. Adams' body had been found.

176 A. Why we procured an engine and caboose at Sandpoint, and some of the section men took us up to about a mile and a half this side of Pack River station, and there, as we were going slowly, we discovered the body lying some distance from the track, and stopped and went down to the body, and I recognized——

Q. (Interrupting.) Now, where were you standing when you first saw the body, Mr. Pierce?

A. Standing on the rear of the caboose, I think.

Q. On the rear of the caboose?

A. Yes, sir.

Q. How far, in your judgment, was the body from the point of the

track immediately under the rear of the caboose upon which you were standing, when you saw the body?

A. Well, it would—I cannot tell you just where the caboose was when I first saw it, but I should say, from a straight line from the convexity of the curve it would be about seventy-five or eighty feet—from the curve.

Q. What did you do after you saw the body, with reference to aiding——

A. (Interrupting.) We went down to the body; and I there recognized it as that of Mr. Adams.

Q. Yes. Now describe to the jury how the body was lying when you saw it.

A. It was lying in kind of a diagonal direction from the curvature of the track, with the feet pointing rather eastward, or whatever direction the track is there, and the head lying farthest from the track. It was lying against a big clump of bushes, rather on the side of the body, and the side of the face. The side of the face was then at the roots of a clump of bushes.

Q. And how were the feet lying with reference to the head, as to being higher or lower?

177 A. Well, it was rather an incline where the body was lying. It is a very steep incline right next to the track and to where the body was it levels out more. But it was a slight incline so that the feet were a little higher than the body.

Q. Did you make any investigation at that time of the physical conditions on the ground?

A. Yes, sir.

Q. For the purpose of finding any indications that might lead to some solution as to where the body struck?

A. Yes, sir, I did.

Q. Now, you may start from the body—in starting from the body in what sort of a direction would you go toward the track in reaching the first indication which you saw on the rocks, whether at right angles, diagonally, or how?

A. It went diagonally. We investigated the grounds very thoroughly, and came to the conclusion,——

Q. (Interrupting.) Who was with you when you investigated the ground?

A. Mr. Allen, Mr Gabbart, and some of the railroad men—I think one was the section foreman. I did not ascertain the names of the railroad men.

Q. Then starting from the body you would be proceeding toward the track in a northeasterly direction?

A. I should judge it to be—there are very frequent curves there, so I do not know exactly the points of the compass there, but I should judge it to be in a northeasterly direction.

178 Q. Now, how far from the body, where you found the body lying, did you find the first indication of the accident upon the ground—how far northeast from the body?

A. I should say, walking towards the first curvature of the track—the easterly end of the curve—walking towards that, I should think

it would have been all of forty feet from the body where we found quite a number of splatters of blood. And then going farther on there was I should say twenty-five feet—there was a sharp rock, that is, going toward the curvature of the track again—there was a sharp jagged rock on which there was a large splatter of blood. The point of the rock was pretty much covered with blood and a few little portions of what seemed to be a skull. And then just a few inches from the point of that rock was a pair of glasses with one of the eyes out. Then a little farther on toward the track there were just a few splatters of blood.

Q. Anything between those few splatter- of blood and the track,——

A. Yes, sir.

Q. —that you observed?

A. Quite near the entrance to that curve was his hat, I remember.

Q. Now, drawing a line, Mr. Pierce, from the body through these points that you have described to a point where it intersected the track, how far on that occasion did you estimate the body was from the track?

A. Well, I roughly estimated it at that time on that line somewhere in the neighborhood of one hundred feet, but I assisted afterwards in making a measurement, so that—but I don't remember those measurements exactly; but I do practically though.

179 Q. You went out to the same point on the 25th of March, 1900, did you not?

A. It was in that neighborhood, I don't remember.

Q. At my request?

A. Yes, sir, I went up with you last spring.

Q. The fact of the matter is it was raining that day, wasn't it, Mr. Pierce?

A. Yes; it was quite disagreeable weather.

Q. And you and I were content to stand on the track and hold our umbrellas over us and let the other fellows do the work on that occasion?

A. We did, yes, sir.

Mr. THOMPSON: We take that for granted.

Q. Now, I will ask you, Mr. Pierce, if you made any investigation—I was speaking though, of the act of measuring—you did not assist in measuring?

A. No, sir.

Q. Holding the chain or anything of that kind.

A. No, sir; I simply observed it.

Q. But I will ask you what examination you made of the ground which you had examined theretofore, on the 14th day of November, 1898—what examination you made of that ground on the 25th day of March, 1900, with reference to finding, locating the spot at which the body had laid, and the various other points that you have testified to?

A. Well, we—starting from Pack river we walked up and inves-

tigated each of the curves. I did, in company with yourself, your brother, a surveyor, and Mr. Allen.

Q. Oscar S. Bowen?

180 A. Yes, sir, I think that was the name of the surveyor. Not knowing exactly what curve it was we had to designate the place from memory. When we came to this place about a mile and a half from Pack River station coming west, I identified the curve as the one at which I had seen Mr. Adams' body. We went down there and examined the bushes, and finally identified the——

Q. (Interrupting.) You say "we went down;" who do you mean—for the purpose of identifying.

A. Mr. Allen and myself. He had been there before when the body was removed.

Q. Yes.

A. And we both identified the bush where the body was lying—had been lying.

Q. Had you any doubt whatever as to that point?

A. No, sir, none whatever.

Q. And what information, if any, did you give to Mr. Bowen, the surveyor, in connection with that point?

A. I showed him the point where the body was lying and the point where the head was lying.

Q. Yes.

A. Then after that we searched around for the stone where I found the glasses and this largest splatter of blood. And from that I estimated the distance, and found what I took to be where the second splatter of blood, between the body and this sharp stone, and then sought the other point, where the few drops of blood were, and taking those four points, the surveyor made a line through them to where he would—a direct line in a diagonal direction to the first curvature of the track.

181 Q. Yes.

A. And then after that, measured between the different points.

Q. Now, from the point where the body was found, drawing a line at right angles with the track, with the nearest point of the track, how far did you, on the 14th of November, estimate the distance there? I don't know whether you have said that or not.

A. Well, I believe I did say about eighty feet, I estimated it.

Q. Have you any recollection at this time as to the distance found by the surveyor, by the measurement?

A. Not definitely, but I think it was seventy-five feet that he——

Q. You did not help make that measurement?

A. No, sir, I stood there on the track, and that is my recollection of his figures after he came upon the track.

Q. Now, you say you had known Mr. Jay H. Adams for eight years?

A. Yes, sir; at that time I think it was about that length of time.

Q. During that time were you a brother lawyer practicing with him at the bar in Spokane?

A. Yes, sir.

Q. In the courts of the State?

A. Yes, sir.

Q. Were you during that time, at and prior to the 13th of November, 1898, acquainted with Mr. Adams' character, capacity and standing as a lawyer at the bar of Spokane and of the courts in the State of Washington?

182 A. I was very well acquainted—in this county and also in the courts of the State.

Q. What was that reputation, character, and capacity?

A. Why, his reputation as a lawyer was good. His capacity—I assume you mean his earning capacity?

Q. Dispatching of business, capacity for the dispatch of business?

A. Why, it was good.

Q. And what was his character as a lawyer?

A. It was good.

Q. Now, Mr. Pierce, prior to the 13th day of November, 1898, had you had some occasion to travel over the Northern Pacific railroad?

A. Quite a good deal, yes, sir.

Q. Did you become familiar with the practice of the Northern Pacific railroad in running dining-cars on its through trains?

A. Yes, sir. I have been over it a number of times.

Q. Did you become familiar with the practice of the Northern Pacific in permitting the traveling public to pass to and from the dining-cars?

A. Yes, sir.

Q. And what was that practice with reference to when the train was in motion or when it was standing still, at meal times or otherwise?

A. The practice as to what?

Q. As to permitting the traveling public to pass to and from the dining-car.

A. Why, my experience, it did not make any difference whether it was moving or stopped.

Q. Whether it was moving or stopped?

A. No.

183 Q. And do you remember the practice of the company as to calling meals—indicating to the traveling public that the meals were ready—whether they did that when the train was standing still or in motion?

A. I should think they did it in both; it just happened to be where the train was at that particular hour.

Q. I will ask you if you have, between meals, when meals were not being served, had occasion to invoke the convenience of the dining-car, when you were traveling over the Northern Pacific?

A. Outside of meal hours?

Q. Yes, sir.

A. Yes, sir.

Q. And when, if at all, were you prevented from enjoying the convenience of that car outside of the meal hours, when you desired to go there?

A. I don't think I ever had any objection made, outside of perhaps it would be after the time that they wanted to clear the car for the services of the employees at night; at about 10 o'clock at night.

Q. At about what time, do you say?

A. At about 10 o'clock at night I think they generally did not desire people in there.

Q. Prior to the 13th of November, 1898, Mr. Pierce, what occasion have you had to ride over other roads in the United States besides the Northern Pacific?

A. Why, I have been over——

Mr. THOMPSON: Wait a minute. I think that is entirely incompetent, that element. It is to try a question no one can be brought here to meet.

The COURT: I sustain the objection.

184 Mr. C. S. VOORHEES: If your honor please, I am leading up to the question of the vestibule device. I am going to follow it up with the question as to what his observation has been of the generality of the use of the vestibuled cars.

The COURT: Well, that is a matter of such universal knowledge that I do not think that you need spend much time about it. The jury know about that as well now as they would after the witnesses have given their evidence on the stand.

Mr. C. S. VOORHEES: I did not know your honor felt that way about it, and I thought it was a part of my case and I would prove it. If your honor takes that view of it, I withdraw the question. I am not desirous of wasting any time.

The COURT: If you propose to prove that on other roads it has become the universal practice in good railroading to have trains solidly vestibuled, of course I will allow you to prove it. But just to simply prove the general makeup of trains in this country up to this time, I think is a needless waste of time.

Mr. C. S. VOORHEES: I merely intended if your honor please, to show that the vestibule appliance was, on the 13th of November, 1898, and for a long time prior thereto, in known and common and general practical use upon the railroads throughout the United States; that is what I intended to prove by the witness. That was the purpose of my question.

185 The COURT: You do not have to prove that; that is well known; a matter of common knowledge.

Mr. C. S. VOORHEES: Very well, sir. That is all.

Q. There was one question I omitted, Mr. Pierce, and that is as to the character of the ground as you found it on the 25th of March, 1900, as it compared with the ground as you saw it on the 14th of November, 1898, as to being the same or otherwise.

A. It was practically the same; there may have been a little work, or removal of stones, at the very base of the steep declivity; there was a riprap on the track; it seemed to me that there was a little disturbance of the fine stones that was at the bottor of that riprap. I did not quite recognize it as being the same; as we had to

carry the body over those stones, why, I naturally examined it, and noticed it in the search for the particular spots where the blood was. I know I remarked at that time that there might have been a little disturbance of those—of that fine rock; and there may have been some work done on the roadbed, I think there had been.

Q. What was the general character of the ground, as to being rocky, or otherwise?

A. Well, it is a very steep roadbed; that support going up to the roadbed, I should say, for a distance of about fifteen feet that it was a very sharp, abrupt descent, and I think, as I referred to it before, they call it riprap, it is all worked over with stones and the earth is completely hidden.

Q. I just wanted generally an idea as to the surface of the
186 ground over which you passed, as to its being rocky or otherwise?

A. It was rocky.

Q. Now, after the body was found—did you aid any in transporting the body after you found it?

A. Yes, sir; I assisted in taking it up to the roadbed.

Q. And was that the last you saw of it?

A. No, sir; I accompanied it back to Spokane—or first to Rathdrum, where an inquest was held, and from Rathdrum to Spokane.

Q. Rathdrum to Spokane?

A. I saw no more of it after it left the depot at Spokane.

Q. Within your knowledge, in what way was the body handled otherwise than it was necessary to handle it in the transporting of it?

A. Why, it was handled very carefully and disturbed as little as possible. The coroner was at Rathdrum, and very careful to leave it in the same condition as nearly as possible in which it was lying.

(Excused.)
(Not cross-examined.)

OSCAR S. BOWEN, testified:

Direct examination:

(By Mr. C. S. VOORHEES:)

Q. Where do you reside, Mr. Bowen?

A. Spokane.

Q. How old are you?

A. Thirty-two.

Q. What is your business?

A. Civil engineer.

187 Q. What was your business on the 13th day of November, 1898?

A. I was a civil engineer.

Q. What experience in railroad engineering have you had, if any, Mr. Bowen?

A. I have had considerable experience in the location and construction of railways.

Q. Where were you on the 25th day of March, 1900, if you recall?

A. I was at Hope, and at a point about six or seven miles this side of Hope, on the line of the Northern Pacific railway.

Q. What information, if any, was given to you, relative to the circumstances surrounding the finding of the body of Jay H. Adams deceased, on the 14th of November, 1898; on that day, what information was given you, on the 25th day of March, 1900?

Mr. THOMPSON: We object from the fact that the court knows beforehand what the object of this testimony is, that Mr. Bowen was an engineer and went out there, and affected to take some measurements from some statements made to him at the time by other parties. I think it is entirely incompetent what other parties said to him; and we think his testimony incompetent, as to any measurements he made from what anybody said to him.

(Overruled. Exception allowed defendant.)

A. There was pointed out to me by Mr. Allen and Mr. Pierce a point between the track of the Northern Pacific railway and the shore of the Pend d'Oreille lake, by a bush, where Mr. Adams' body had been found.

188 Q. You mean by Mr. Albert Allen, who has just been upon the stand?

A. Yes, sir.

Q. I will ask you to look at that tracing (hereafter marked Plaintiffs' Exhibit "C 2") and state to the jury who made that tracing.

A. I made it.

Q. Now, you may state to the jury what you intended to indicate by the red round mark indicated by the letter "A"?

A. That is the point that I spoke of as being shown to me as the place where Mr. Adams' body was found.

Q. What point did you intend to indicate by the red mark upon this tracing indicated by the letter "B"?

A. That is a point nearer the track, pointed out to me as a place where blood and a piece of bone had been found.

Q. What did you intend to indicate upon this tracing by the red mark indicated by the letter "C"?

A. That is the point where a straight line drawn through "A" and "B" would intersect the Northern Pacific railroad.

Q. Did you at that time, on the 25th day of March, 1900, make a measurement from the red mark indicated by "A," through the red mark indicated by "B," to the red mark indicated by "C"?

A. Yes, sir.

Q. What distance did you find?

A. The total distance was one hundred and eight feet.

Q. Did you make a measurement from the red mark indicated "B" to the red mark indicated "A," upon this diagram?

A. Yes, sir.

Q. What did you find the distance was?

189 A. Fifty-seven feet.

Q. Did you make a measurement from the red mark indi-

cated by "B" to the red mark indicated by "C," where that diagonal line intersects the track of the Northern Pacific railway?

A. Yes, sir.

Q. How much did you find that?

A. Fifty-one feet.

Q. You may state to the jury what is indicated by this black and white line.

A. That is the track of the Northern Pacific railway.

Q. In what direction does that track run at that point?

A. In a southeasterly and northwesterly direction.

Q. In what direction then was the train proceeding?

A. Northwesterly direction.

Q. In a northwesterly direction?

Mr. THOMPSON: What train have you there now?

Mr. C. S. VOORHEES: I am talking about the train from Hope to Spokane.

Q. In what direction would a train coming from Hope to Spokane proceed?

A. In a northwesterly direction.

Q. Now, you may state whether or not you made a measurement on that occasion—on the 25th of March, 1900—with reference to the curve opposite which the body of Jay H. Adams was described to you as having been found.

A. I made a measurement to find out the degree of curve.

190 Q. To find out the degree of curve?

A. And found it to be a six degree curve.

Q. I will ask you whether or not you made a measurement from the red point marked "C," in an easterly direction, eastward, to find out how far the point at which this diagonal line intersected the track, was from the point of the beginning of that curve?

A. Yes.

Q. How far did you find it?

A. One hundred and twenty-five feet.

Q. From the point at the beginning of that curve, I will ask you if you made a measurement to determine how long the tangent or straight line leading up to that six degree curve was?

A. I measured it by counting the rails.

Q. How long did you find that tangent?

A. Nine hundred and ninety feet.

Q. Did you make any measurements from the point opposite the body, that is, the point on the track, where the body was shown to you as having been found, to the railroad track, where it intersected the railroad track, any further back than to the beginning of that curve, and including the tangent?

A. I don't understand what you mean.

Q. What measurement, if any, did you make from that point where this diagonal line intersected the track, back to any mile posts?

A. I did not make any measurements from that point. I

made measurements from a point opposite where the body was found.

191 Q. From a point opposite where the body was found?

A. Yes, sir.

Q. Do you mean at right angles?

A. Yes, sir, at right angles to it.

Q. From a point at right angles?

A. Yes, sir.

Q. Did you make a measurement from the point at which it was shown to you that the body had been found, to the nearest point of the track where the body had been found?

A. Yes, sir.

Q. And how far did you make it?

A. Sixty-four feet.

Q. Now, from that point to the point shown to you where the body was found, from that point to the track easterly at right angles, you measured to what point?

A. I measured easterly by counting the rails, to what was the six-mile post from Hope.

Q. You found a mile post there, and measurement marked upon that post?

A. It was marked "H C W 203."

Q. And how far did you find it?

A. By counting the rails I made it two thousand one hundred feet.

Q. Two thousand one hundred. Did you make any measurement from the point on the railroad track where a line drawn at right angles from the body intersected that track to Pack River trestle, that is to the west end of Pack River trestle?

A. I measured to a post marked "Pack River trestle 1 mile," and that post was west of Pack River trestle.

Q. And what distance did you make that?

192 A. Three thousand four hundred and eighty feet by counting the rails.

Q. Had you prior to the 13th of November, 1898, had any experience as a photographer, Mr. Bowen?

A. A little.

Q. Did you make an effort at that time, on the 25th day of March, 1900, to make some photographs?

A. Yes, sir.

Q. I will ask you to look at that (handing witness photograph).

A. Yes, I took that.

Q. You took that photograph. Where was that photograph taken from?

A. That was taken from a point between the point indicated to me as the place the body was found, and the shore of the lake, from a point where the lake is.

Q. What direction was your instrument pointed in when that was taken?

A. It was pointed on a line through the point where the body

was found and the point where the blood was found, and on through on a straight line to an intersection with the track.

Q. I will ask you if you took that photograph (handing witness photograph).

A. Yes, sir.

Q. Please tell the jury where the instrument was when that photograph was taken.

A. It was placed on the roadbed of the Northern Pacific railway, and looking towards Hope along the track.

193 Q. The first point here which looks like an obstruction is what?

A. That is an umbrella.

Q. And the next point further east?

A. An umbrella.

Q. You may tell the jury what point that umbrella indicates.

A. The first umbrella indicates the point on the track opposite the point where the body was found. The umbrella in the distance indicates the point on the track where the line from the point where the body was found, through the point where the blood was found intersected the track.

Mr. REESE H. VOORHEES: Is that the umbrella nearest Hope?

A. Yes, sir.

Q. Where was that instrument placed with reference to this six degree curve that you have described?

A. It was placed on the track some place, I think, near the outer rail, and probably a couple of feet above the rail.

Q. Within the curve?

A. It was on the curve; yes, sir.

Mr. THOMPSON: There were three of those exhibits at the last trial?

Mr. R. H. VOORHEES: The third was not put in evidence; one was a very dull one, and was not introduced.

Q. Now, did you take any elevations on the 25th day of March, 1900?

A. Yes, sir.

Q. How far did you find it, if you took that elevation, from the track, a point where the diagonal line would intersect the

194 track to the base of the riprap, did you take that elevation?

A. I did not take that elevation. The first elevation I took was down to the point indicated to me as the place where blood and a piece of bone had been found.

Q. You took the elevation from the track down to that point?

A. Yes, sir; that was thirteen and one-half feet.

Q. Then what other elevation did you take?

A. I took the elevation from there down to the point that was indicated as the place where the body had been found; that was five and one-half feet more, making a total of nineteen feet from the track to that point.

Q. Nineteen feet of elevation from the track at a point where the

diagonal line intersected the track and the point where the body was described as having been found?

A. Yes, sir.

Q. Now, you may describe the surface character of the ground there as you found it on the 25th of March, 1900.

A. From the railroad embankment to the lake the ground was covered with bowlders, some round and some flat, nearly all, if not all, smooth, and water-washed; the places between the bowlders was filled with sand, apparently, no soil to amount to anything.

Q. What was the condition of the riprap from the railroad track down to the bottom of the riprap?

A. It was carefully laid with stones which had evidently been placed in by hand; the face of the riprap was smooth and quite steep.

195 Q. And from the bottom of the riprap to the point shown you as the point where the body was found, what was the condition—sharp, broken, rock, and otherwise?

A. There was a little bench in there of broken rock that had been built along the foot of the riprap.

Q. And from the edge of that bench down to the point where the body was described as having been found, what was the character of the ground?

A. It was bowlders and flat stones, water-washed rock.

Q. Mr. Bowen, I will ask you to tell the jury what, if any, sign you saw on the 25th day of March, 1900, on the west end of Pack River bridge; did you notice Pack River bridge?

A. Yes, sir.

Mr. THOMPSON: We object to what might have appeared there in 1900, nearly two years after the accident, as totally incompetent, irrelevant and immaterial.

The COURT (to plaintiffs' counsel): Are you going to connect it with other evidence, to show the same sign was there before?

Mr. C. S. VOORHEES: Not unless they do it on cross-examination.

The COURT: What is the purpose of it?

Mr. C. S. VOORHEES: It is to show a slow sign, requiring four minutes to cross Pack River trestle.

(Defendant objects as immaterial. Objection sustained. Exception allowed plaintiffs.)

Q. Did you notice at that time a house at the west point of Pack River trestle?

A. Yes, sir.

196 Q. What was it?

A. I remember of a section-house being there.

Q. What sign, if anything, was on that house?

Mr. THOMPSON: We object, if your honor please, upon the same ground.

(Objection sustained.)

Mr. C. S. VOORHEES: We have already shown by Mr. Simonson that there was a house there on the other side, on the 13th of No-

vember, 1898, and I am simply asking if this house was there when this witness was over the ground.

The COURT: It is immaterial. Objection sustained.

(Exception allowed plaintiffs.)

Cross-examination.

(By Mr. THOMPSON:)

Q. Mr. Bowen, you drew this little tracing to scale, did you?

A. Yes, sir.

Q. And it is correct as it is now represented?

A. Yes, sir.

Q. And the matter which you have written on there, that was done at the time that this tracing was made?

A. Yes, sir.

Q. And that is the information simply that you had received at that time, as pointed out to you? You have no idea as to the truth of what was being pointed out to you?

A. No, sir.

Q. And you simply made the measurements from the state-
197 ments that were made to you at the time. You also have one indicia, that which you testified about; I did not hear you; I would like to ask you. You have here a distance from the point opposite where the body was found, to Pack river, one mile—three thousand four hundred and eighty feet. Did you make that measurement?

A. I measured the three thousand four hundred and eighty feet by counting the rails; and then I took—that was to a post marked, "Pack river, 1 mile," and that is how I got the distance—assuming the post was right.

Q. You added the two together then?

A. Yes, sir.

Q. That scale on the drawing is two hundred feet to the inch?

A. Yes, sir.

Q. And is correct on that scale?

A. Yes, sir.

Q. I will ask you at the time these distances were being pointed out to you by Mr. Allen, if Mr. Allen did not state to you himself that he himself was not sure of the points that he was giving you?

A. No, sir, I don't think he said anything like that. He seemed to be quite positive of the points.

Q. Didn't he state to you that he could not tell where the point of blood was? In order to refresh your recollection, I will ask you if you did not testify on the former trial of this case?

A. Yes, sir.

Q. I will ask you if this question was not asked you: "Well, were there any other points indicated generally as being in line with the body and with the point of blood that you speak of?" and you answered: "Yes, sir." Then, if this question was not asked

you, "Where were they?" And you answered: "Mr. Allen
198 showed me a place between the rocks I describe and the bush approximately midway where he said had been blood, but he could not positively identify the place."

A. Yes, sir; I think that is my testimony.

Q. That is true?

A. Yes, sir.

Mr. THOMPSON: So far as this tracing is concerned, we have no further objection than the one we made before. We object to it as not being based upon the witness' knowledge, but based upon hearsay evidence given to him afterwards by other parties.

(Objection overruled. Defendant allowed an exception. The tracing is marked Plaintiffs' Exhibit "C 2.")

Q. Taking the photograph which is marked Exhibit "C" on the back, I will ask you to state if that is one of the photographs that you made and identified a few minutes ago.

A. Yes, sir.

Q. Now, there is a small cross marked in ink upon that photograph, with a white point near it; what was that cross put on to indicate?

A. That cross is in pencil.

Q. Is it in pencil?

A. Yes, sir.

Q. It looks as though it might be in ink.

A. It was at the base of the bush; it was at the point indicated to me as where the body was found.

Q. That is the point pointed out by Mr. Allen to you as being where the body was found?

A. Yes, sir.

Q. And you made that cross so as to designate it on the photograph?

A. Yes, sir.

Q. That photograph correctly shows the location, does it, Mr. Bowen?

A. Yes, sir.

199 Q. And it correctly shows the characteristics, the rocky surface, does it?

A. Yes, sir.

Q. Now, upon this photograph, Mr. Bowen, at about a half an inch above the little white dot, and perhaps three-quarters of an inch above the cross, there appears along the margin of a rocky bluff, a well-defined line; what is that line—what does it indicate?

A. That is the top of the roadbed of the Northern Pacific railway.

Q. And from that line down the photograph, for perhaps between a sixteenth and a quarter of an inch, is a defined declivity; what does that represent?

A. That is the riprap on the side of the roadbed.

Q. In other words, that indicates the embankment on which the railway rests?

A. Yes, sir.

Q. And that embankment is constructed of well-laid stone?
A. Yes.
Q. Not cemented together, and not built as masonry, but simply loose stones properly laid along, so as to make a solid embankment?
A. Yes, sir.
Q. How high was that embankment from the surface of the roadway down to the bottom of that defined embankment?
A. I did not measure it, but I think it is about ten feet.
Q. Then, from the base of that defined embankment there was another slip of loose riprap, was there not?
A. Yes, sir.
200 Q. And about how high was that? In other words, how much of a declivity of that loose riprap?
A. I think about—well, to the bottom of that riprap was about; from the top of the roadbed was about thirteen and one-half. For it was right at the foot of the riprap that was pointed out to me as the place where blood was found that I measured to, so that would make a riprap there of probably three and one-half feet.
Q. Now, the embankment of the roadbed proper, displaced stone, was quite steep, was it?
A. Yes, sir.
Q. What would you say as to slope? Was it a slope of one to one or one-half to one?
A. Oh, it was probably nearer a slope of a half to one.
Q. A slope of a half to one; and this loose riprap had a much greater slope, had it not?
A. Yes, sir.
Q. What would you say as to that, whether it was one or two or three to one?
A. Well, that was built in the form of a kind of bench; it was flattened out and then sloped down this way.
Q. And right at the base of that was the point where it was pointed out to you that there had been considerable blood?
A. Yes, sir.
Q. And that was the point that Mr. Allen could not be sure about?
A. No, sir.
Q. That was not the one?
A. That was not the one.
Q. Where was the point that he could not be sure about? Between that point and the body?
201 A. It was between that point and the body; yes, sir.
Q. That he could not be sure about. The roadway of the railroad at that point has been blasted out of the side of a bluff, has it not?
A. Yes, sir.
Q. And in actually building the road, the bluff stands up abruptly on the right hand side as you face toward Spokane, then comes the level roadway, and then the break down of the embankment, as you face towards Spokane?

A. That is the way it is.

Q. And it has been blasted out of this bluff, and the material blasted out, and the stone has evidently been used in making the embankment below?

A. It appears so.

Q. It appeared to be at least. That surface, the top surface you have represented in the other picture, marked Exhibit "B," have you not, the top surface of the track?

A. Yes, sir.

Q. And that correctly represents a view down the track in the direction of Hope from towards Spokane—looking from towards Spokane in the direction of Hope?

A. Yes, sir.

Q. And that correctly represents the track?

A. Yes, sir.

Q. Your instrument must have been placed either just outside of or directly over the outside rail as you face towards Hope, was it not?

A. I think it was very close to the rail.

Q. The first shadow, or object in the distance, represents an umbrella about opposite the point where the body was pointed out to you to have been found?

202 A. Yes, sir.

Q. And the other umbrella beyond represents what?

A. A point at which the line from the point where the body was found drawn through the rocks on which blood and bone was found intersects with the track.

Q. And how far would that be? I believe you stated about one hundred and odd feet?

A. One hundred and eight feet that line was.

Q. So that that would represent about that distance?

A. Well, that is not shown on here.

Q. Well, what I mean is, that the one umbrella being opposite the body, and the other at that other point, the distance between them would represent about that one hundred and eight feet?

A. No, sir, it would not be that far.

Q. Well, what?

A. I don't know how far that is.

Q. Why wouldn't it be as far?

A. Well, the other is on a diagonal line.

Q. And that is on a curved line, isn't it, running through the same diagonal?

A. No, sir; the other line measures away out this way.

Q. Let us have the other exhibit, please.

A. This is one hundred and eight feet from "A" to "C."

Q. From "A" to "C" is one hundred and eight feet?

A. Yes, sir.

Q. This line from "A" to the railway line is supposed to be at right angles to the railway curve, is it not?

A. Yes, sir.

203 Q. If the railway line were entirely straight, instead of being curved—if it was entirely straight, the two distances would be the same, would they not?

A. No, sir.

Q. If those two were at right angles to each other?

A. No, sir.

Q. I wish you would take a piece of paper and draw a triangle, with the base of the triangle straight from one line to the other.

A. Well, a diagonal is longer that the base or perpendicular.

Q. There would be two diagonals there, if the two lines departed from each other in a straight line from this point here?

A. If they were at right angles there could only be one diagonal.

Q. But the only thing at right angles is this right angle here, that was made at right angles to the railway line, was it not?

A. Yes, sir.

Q. Now, I wish you would say to the jury what the difference would be between point "B" and point "C" and between point "C" and the point on the railway line at right angles to it.

A. I could not say exactly unless I calculated; but it would be considerably less.

Q. It would be considerably less?

A. Yes, sir.

Q. And it is on a curved line, the one I last mentioned, with the railway, it is on a curved line, and the other on a straight line?

A. Yes, sir.

204 Q. You examined the surface of the railway line when you were taking this photograph that you say correctly represents it, did you not?

A. Yes, sir.

Q. That railway track there was well constructed and in good condition, was it not?

A. Yes, sir.

Q. And thoroughly ballasted?

A. Yes.

Q. Heavy rails, were they not?

A. Appeared to be.

Q. Everything appeared to be in good condition?

A. Everything appeared to be in very good condition.

(The photographs referred to are marked Plaintiffs' Exhibits "B" and "C;" the diagram was marked Plaintiffs' Exhibit "C 2.")

Redirect examination.

(By Mr. R. H. VOORHEES:)

Q. Mr. Bowen, you have been asked if Mr. Allen was quite positive as to those spots. I will ask you whether or not he was quite positive with regard to all but one of the spots that he pointed out to you?

A. Why, he seemed to be. I understood at the time that he was; yes, sir.

Q. No uncertainty about him at all that you saw, except as to one spot?

A. That is all.

Q. And that was the spot midway between the sharp rock, as he pointed it out to you, or in the place where the blood and bone had been found, and the spot where the body had been found, near the bush?

A. Yes, sir; a place approximately midway.

205 Q. The place where the body was found, the spot where the blood and bone was found, those spots he pointed out positively?

A. Yes, sir.

Q. You spoke of the spot where the blood and bone was found as being at the base of that riprap, the loose riprap you spoke of. You meant by that that that bench went out a little from the riprap proper, and then went down to the slope of the beach proper?

A. That is the way it was.

Q. And it was at the little decline, where the bench terminated that he pointed out the place where the bone and the blood had been found, did he?

A. Yes, sir.

(Excused.)

LOUISE H. ADAMS, one of the plaintiffs, testified:

Direct examination.

(By Mr. C. S. VOORHEES:)

Q. Mrs. Adams, state to the jury your name and age.

A. My name is Louise H. Adams; I am fifty years of age.

Q. You are one of the plaintiffs in this suit?

A. Yes, sir.

Q. And you are the widow of the late Jay H. Adams?

A. Yes, sir.

Q. When were you and Mr. Jay H. Adams married, Mrs. Adams?

A. In Lafayette, Indiana, on the 27th of December, 1870.

Q. When did you and Mr. Adams remove from Indiana?

A. In May, 1891.

206 Q. And where did you go from there?

A. We came here to Spokane.

Q. And where had you lived other than in Spokane at any time subsequent to Mr. Adams' death, if anywhere?

A. Do you mean after we came here in 1891?

Q. After you came to Spokane.

A. Nowhere else.

Q. I think I said subsequent; I mean prior to his death. You lived in Spokane, then, from May, 1891, until Mr. Adams' death?

A. Yes, sir.

Q. The 13th of November, 1898?

A. Yes.

Q. When was Mr. Adams born?

A. He was born the 16th of November, 1847.

Q. Now, you may state to the jury, Mrs. Adams, as well as you can, what Mr. Adams furnished you in the way of maintenance and support and so on.

A. Every possible thing in the way of comfort and luxury that love and care could do.

Q. Where did you and Mr. Adams live in the city of Spokane at the time of his death?

A. On the corner of Seventh avenue and Lincoln St.

Q. You may describe that home to the jury, Mrs. Adams.

A. It is a large house, with sixteen rooms, all the modern conveniences. Well, it is more than a comfortable home; it is a very beautiful home.

Q. How about the lighting and the heating?

A. It was lit by electricity, and heated by two furnaces and seven fireplaces.

Q. And those were kept in use during the winter time, during the cold weather, for heating?

A. Yes, sir.

207 Q. Tell the jury, Mrs. Adams, how your house was furnished?

A. It was furnished very well indeed; handsomely furnished.

Q. How as to its being furnished throughout?

A. Every part was furnished.

Q. Now, you may state to the jury, as near as you can, Mrs. Adams, how much it cost to maintain the home that you have described?

A. I could not tell the exact amount, because I did not pay the bills; but I know that it cost—it must have cost more than four thousand dollars; and from my actual knowledge, and I have heard Mr. Adams say, that it cost——

(Defendant objects to what Mr. Adams said, as hearsay.)

Q. Do not say what Mr. Adams said.

A. Well.

Q. You say you did not pay the bills?

A. No, sir.

Q. Why did you not pay the bills?

A. Because Mr. Adams did not want me to have the care and annoyance of it.

Q. Now tell the jury what kind of a provider Mr. Adams was, in making provision for the care and maintenance of the home?

A. I used to tell him he was too good a provider, because he brought into the home more than I knew quite what to do with.

Q. Now, you may tell the jury, Mrs. Adams, as to Mr. Adams' character during his married life, as to his care, exhibitions

208 of care and attention for your comfort, for the purpose of relieving you from burdens.

A. He never failed in any way possible that he could do, to care for me, in sickness and in health, and at every time.

Q. You say in sickness and in health. What is the fact as to your having been yourself sick at times during your married life?

A. I have been sick, crippled with rheumatism a great deal of the time.

Q. What was Mr. Adams' character as a nurse?

A. He was the very best possible nurse.

Q. You say he was the very best possible nurse. How do you know that?

A. Well, I know something about other nurses, and I know it would be impossible to find a better nurse than Mr. Adams.

Q. In what way, if at all, were you the beneficiary of that careful nursing?

A. Because he cared for me.

Q. What?

A. He himself nursed me when I was sick.

Q. What was Mr. Adams' character as to being a domestic man?

A. He was home a great deal of the time—all the time that he could be away from his business.

Q. What was the fact as to where he spent his evenings?

A. Always at home, unless he was obliged to go to his office.

209 Q. And about what proportion of the time would it be that he spent at his home?

A. Well, the greater part of the time; when he would be away from the office.

Q. What relation to you is Frank H. Adams, the other plaintiff in this cause?

A. My son, and Mr. Adams' son.

Q. When was he born?

A. He was born the 21st of September, 1877.

Q. Now, you may state to the jury what plans Mr. Adams had in contemplation relating to Frank's education and future in life?

A. He was to finish his college course at Stanford, go to Harvard for the law course, and then afterwards go into Mr. Adams' office, and go into partnership with his father as a lawyer.

Q. How far had Frank progressed at Stanford at the time of his father's death?

A. He was in the junior year. He had been there a little over two years.

Q. Do you know, Mrs. Adams, the cost of maintaining Frank at Stanford?

A. I think it was about six hundred dollars. That did not include his clothing.

Q. Six hundred dollars for what period?

A. A year.

Q. When did you last see Mr. Adams in life, Mrs. Adams?

A. The morning of the 13th of November, 1898.

Q. On the morning of the 13th of November, 1898?

210 A. Yes, sir.

Q. When did you next see Mr. Adams?

A. Never alive again.

Q. You never saw him again in life?

A. No, sir.
Q. And when did you see him dead?
A. Monday afternoon, the 14th of November.
Q. The 14th of November. I will ask you, Mrs. Adams, to describe, if you can, the character of the left hand of Mr. Adams when you saw him, after his death, as to being bruised or otherwise.
A. His left hand was black, and bruised—swollen all out of shape.
Q. Whereabouts was the swelling?
A. The swelling was through the palm (indicating) and the wrist.
Q. Do you know, Mrs. Adams, what Mr. Adams' habit was, and when he left, as to wearing a ring upon his left hand?
A. He had two——
Q. I just ask you if you know his habits.
A. Yes, sir; I know he wore a ring on his left hand.
Q. He wore a ring on his left hand?
A. Yes, sir.
Q. You may describe that ring to the jury?
A. It was a seal ring; a ring with an amethyst set.
Q. State to the jury, if you know, whether he had that ring on his hand when he left the house on the morning of the 13th of November.
A. I know he had; because I noticed it.
Q. Did you ever see that ring afterwards?
211 A. I never saw that ring until it was brought to me afterwards.
Q. Brought to you. Have you the ring?
A. Yes, sir.

(Witness produces ring.)

Q. Is that the condition that the ring was in at the time it was brought to you?
A. Exactly.
Q. Do you remember who brought it to you?
A. Mr. —— someone handed it to my sister, and it was given to me.
Q. Do you recognize that ring as the ring that he had on when he left home that morning?
A. Yes, sir. That is the ring; no doubt about that.

(Plaintiffs offer ring in evidence; same was received without objection; and marked Plaintiffs' Exhibit "R.")

Q. Do you know what Mr. Adams had when he left home, in the way of a watch?
A. He had a gold watch and heavy gold chain; very heavy gold chain.
Q. What sort of a watch was it, Mrs. Adams—an open or a closed face?
A. Closed face.
Q. A watch something like that (referring to Mr. C. S. Voorhees' own watch)?
A. Yes, sir.

Q. How heavy a chain? Describe that chain to the jury.

A. It was made of long links of gold, as long as that (indicating), very solid and heavy, and then held together with two solid gold rings. Was a very heavy chain.

Q. When did you see that watch next?

A. It was brought to me among the things that were found.

212 Q. What other jewelry of an ornamental character did Mr. Adams wear when he left home that morning?

A. He wore a small ring ov the seal ring, and a diamond stud.

Q. Diamond stud. Have you ever seen the small ring that he wore over the seal ring?

A. Yes, sir.

Q. Was that returned to you?

A. Yes, sir.

Q. And what became, if you know, of the diamond stud?

A. I found it sticking through the necktie, someway it had twisted out of shape, and just went in and out through the necktie.

Q. At and immediately prior to the 13th day of November, 1898, what newspapers of a local character were taken at your house?

A. All of them; the "Outburst"——

Q. (Interrupting.) You say all of them; the "Spokesman-Review"?

A. Yes, sir. And the "Chronicle" and the "Outburst."

Q. What was Mr. Adams' habit as to reading the newspapers, carefully or otherwise?

A. He read them all very carefully.

Q. Did you hear from Mr. Adams at any time on the 13th of November?

A. Yes, sir.

Q. About what time in the day?

A. A little after four in the afternoon.

Q. How did you hear from him?

A. By telegram. It was telephoned to me from the telegraph office.

213 Q. And what, if anything, was said in that telegram as to the reason for his delay in reaching home?

(Defendant objects as immaterial and hearsay. Objection sustained; exception allowed plaintiffs.)

Mr. C. S. VOORHEES: The purpose was to show his habitual thoughtfulness in notifying Mrs. Adams when it was not possible for him to be home on time.

The COURT: Well, I would not want to admit hearsay evidence to prove that. It is not of sufficient importance.

Q. Now, when he read the papers, I will ask you, Mrs. Adams, if you know, whether or not his attention was attracted to the advertisements contained in the papers?

A. I know it was, because he often read them to me.

Q. What was his habit when he was away from home—forced to be away from home—what was his habit, Mrs. Adams, as to notify-

ing you from time to time of his return, or possible enforced detention?

A. Always told me.

Q. Yes.

A. Never failed to let me know if he was detained at all.

Q. Now, on the 13th day of November, 1898, Mrs. Adams, tell the jury what was the character of Mr. Adams' eyesight?

A. His eyesight was not good; he wore glasses; had for many years.

Q. And what, if any, other defect did he have?

A. His hearing was not good—not very good.

214 (By the COURT:)

Q. Did he wear glasses continually or only when he was reading and studying?

A. He wore glasses whenever he wanted to see anything; at the table, or—he wore his glasses most of the time.

Q. Did he wear them when he was walking about?

A. If you called his attention to anything you wanted him to see about the room, he would put them on. He expected soon to get the glasses that he would wear constantly, but he had been putting it off.

(Mr. C. S. VOORHEES:)

Q. From what source other than Mr. Adams had you any income Mrs. Adams?

A. No other.

Q. What provision, if any, did he make for your—what we might call pin money?

A. I had between three and four hundred dollars a year, as near as I can tell; I cannot tell exactly.

Q. And what was his character as to making you gifts or otherwise—what was his habit?

A. Always bringing me things at different times, expensive and otherwise.

Q. Speak up so that the jury can hear you, please?

A. I say he was always making gifts of all kinds, expensive gifts and other things.

Q. Where is the watch now, Mrs. Adams?

A. I have it; exempt property.

Q. You have it with you?

A. No, sir.

Q. That watch, amongst other things, was set apart to you by order of the court as exempt property, after Mr. Adams' death, was it not?

A. Yes, sir.

215 Q. And the pin also?

A. Yes, sir.

Q. Now, what else was there, within your recollection, upon Mr. Adams' person when he left home on the morning of the 13th of

November, 1898, other than the articles that you have described? Did he have a purse.

A. He never carried a purse.

Q. He never carried a purse?

A. No, sir.

Q. Did he have a pocket book of any kind?

A. He had a memorandum book; one or two books.

Q. What became of that?

A. I have that.

Q. That was returned?

A. Yes, sir. He had a little pass-book; and I have that.

Q. A little morocco case?

A. Yes, sir.

Q. What was Mr. Adams' habit as to carrying large sums of money?

A. I never knew him to do it. He never carried a large sum of money.

Q. Do you recall about how much money was returned to you as having been found upon the body?

A. Fifty cents, ten cents and five cents.

Q. What, if anything, was missing from the body, Mrs. Adams, that you knew that Mr. Adams habitually carried?

A. Nothing but the seal of that ring; that is the only thing.

Q. You stated a moment ago Mrs. Adams that after completing his education at Stanford, Frank was to have a course in the Harvard law school, and then was to go into his father's office, ultimately going into partnership with his father. What was his father's purpose in taking him into his law office after he had completed his law studies at Harvard?

216

A. That he might have the benefit of his father's experience as a lawyer.

Q. And instruction?

A. Yes, sir.

Q. Further instruction. What source of income, Mrs. Adams, within your knowledge, had Frank out of which to pay his expenses at college, and through the Harvard law school, other than that which came from his father's providence?

A. He had no other.

Q. What was Mr. Adams' intention, as expressed to you, his purpose, as to how Frank should be supported until he became himself a bread-winner out of the practice of the law?

A. Why, Mr. Adams intended to support him.

Q. How tall a man was Mr. Adams, Mrs. Adams?

A. Five feet seven, very nearly, I think, Mr. Voorhees.

Q. And at the time of his death how much would he weigh?

A. About two hundred.

Q. About two hundred?

A. Yes, sir.

Q. What was his condition of health when he left home, on the morning of the 13th of November, 1898?

A. He was in perfect health. Mr. Adams was a very healthy man.

Q. Had he at any time within the past few years, to your knowledge, complained of indisposition of any character?

A. No, sir. He was never sick.

Q. Now, you may state to the jury, Mrs. Adams, what Mr.
217 Adams' habit was about the house, looking after things, taking care of things, and fixing up little things about the house?

A. He was always busy about the house when he was home; wanted things to be left until he came, that he might look after them himself.

Cross-examination.

(By Mr. THOMPSON:)

Q. Mrs. Adams, when did Mr. Adams buy the home up on the hill here, that you occupied at the time of his death?

A. Nearly four years before his death.

Q. About 1894?

A. I think so, or 1895—the spring.

Q. Do you know what he paid for that home?

A. I do not, exactly.

Q. Do you know about? About how much?

A. We did not buy the home, Mr. Thompson, we rebuilt it.

Q. Well, but didn't you buy it originally from some one, and then rebuild?

A. Yes, sir. Mr. Adams bought it, but I don't know what he paid for it.

Q. You don't know anything about that?

A. But I know of the rebuilding, of course.

Q. What I am trying to get at, can you tell the jury anything near about what the first price was, before he put on the additional work?

A. No, sir.

Q. At the time he bought it there was a mortgage upon it, wasn't there?

A. Yes, sir.

Q. Do you know how much that mortgage was?
218 A. Yes, sir.

Q. How much was it?

A. Five thousand.

Q. Five thousand dollars. And was that mortgage ever paid, Mrs. Adams?

A. No, sir.

Q. And no part of it was ever paid?

A. No, sir.

Q. Was the interest all paid?

A. Yes, sir.

Q. Up to the time of his death?

A. Up until—well, I think it was just about the time of his death that it fell due.

Q. There was about a year's interest due at the time of his death?
A. No, sir; the interest was just due about that time.
Q. Well, I say, at about that time the interest was due.
A. No, sir; not a year's, just one payment.
Q. Was the interest paid annually, or every six months?
A. Every six months.
Q. So, then, there was just simply one payment due upon it?
A. Yes. I think it was due the week of his death.
Q. Now, Mr. Adams, when he died, you say that there was found on his person, or about him, sixty-five cents in silver change; there was no other money found upon him?
A. No sir,
Q. He did not usually carry a pocket-book to carry money in, did he?
A. No, sir.
Q. He usually just carried his money loose, and did not carry large quantities of it; is that it?
A. Yes, sir.
219 Q. The little book, then, that you say, a pass-book, was not a pocket-book at all but that was simply to carry his railroad passes in?
A. That was all.
Q. A little morocco book. And he carried in that passes over the Northern Pacific, the Great Northern, Spokane Falls & Northern, and other lines that he had passes over, didn't he?
A. Yes, sir.
Q. Mr. Adams had been a railway attorney for quite a number of years, hadn't he, Mrs. Adams?
A. Yes, sir.
Q. He was the general attorney of the Spokane Falls & Northern road, and its branch lines, the Nelson & Fort Sheppard road, and the Columbia and Red Mountain, for a number of years up until the September before his death, wasn't he?
A. I think so.
Q. And he had also been an attorney for the Great Northern Railway Company for a number of years, up until about the same time, hadn't he?
A. I think so.
Q. During that time he was away from home a good deal in the daytime in trying cases, up and down those roads, was he not?
A. At times, yes, sir.
Q. Yes, at times. Was he a railway attorney before he left Lafayette, Indiana?
A. No, sir.
Q. He was a member of the firm of Wilson & Adams, was he not, there?
A. Yes, sir.
Q. That firm had a great deal of railway business, didn't it?
A. I don't think they did.
Q. Now, Mrs. Adams, in addition to the little pass-book that was

found upon him, and the sixty-five cents, the ring that was
220 returned to you, and the little piece of jewelry that he wore upon his necktie and his gold watch, there was nothing else of particular value found upon his person, was there?

A. No, sir.

Q. And for aught that you know, he did not take anything else of value away with him when he went?

A. I do not think he did.

Q. Now, Mrs. Adams, after his death, you discovered that he had no money at all in bank, did you not?

A. Yes, sir.

Q. And he left no notes or book of account, did he, Mrs. Adams?

A. No, sir.

Q. None whatever. And the only property that he had was this home where you lived?

A. Yes, sir. And——

Q. (Interrupting.) He had no other real estate?

A. Some lots here in the city in different places.

Q. Do you know where they were?

A. Yes, sir.

Q. Where were they, Mrs. Adams?

A. Why some on the north side and some in Hillyard, a few.

(Mr. VOORHEES:)

Q. We do not hear.

A. I say, some on the north side and some in Hillyard, too.

(Mr. THOMPSON:)

Q. Do you know whether they were inventoried as property of the estate?

A. Yes, sir. They were.

Q. Do you know of what amount of value they were found to be?

A. I do not know that.

Q. Mr. Adams, whenever he was in Spokane, and not forced
221 to go to his office for important work, usually remained at home with you and your son in the evening, did he not?

A. Yes, sir.

Q. And was a domestic man, and much given to the enjoying of the comforts of his home, and remaining at home with his family?

A. Yes, sir.

Q. Mr. Adams was not a speculator, was he?

A. No, sir.

Q. You never knew of his going into any class of business that is ordinarily termed gaming and gambling, so far as buying in stocks, or dealing in securities, or anything of that kind as a speculator?

A. He never did.

Q. He never did. He usually made you his confidant, and told you the character of his business, did he not?

A. I knew very little of his business.

Q. If he had been a speculator, and engaged in such speculations as that, you think you would have known it, wouldn't you?

A. Why, I don't know; I think I should.
Q. You don't think he was engaged in any such business?
A. No, sir; I don't think so.
Q. He was not a man who squandered his money in gambling, or any of the vices, that you know of?
A. I know he was not.
Q. Yes, you know that he was not. And he was not a man given to recklessness in any way in money matters?
A. No, sir; he was a very careful man.
Q. A very careful man; and usually aimed to take care of his money, and provided for his family with it, and stayed at home with them whenever he could; he was a kind man, and in every respect a domestic man, was he not?
A. Yes, sir.

222 Redirect examination.

(By Mr. C. S. VOORHEES:)

Q. Mrs. Adams, do you know how much it cost to rebuild that home?
A. I think it cost nearly twenty thousand dollars to rebuild it. He went to very great expense in rebuilding that house.
Q. Do you know anything about Mr. Adams' income for the year or more prior to his death, Mrs. Adams?
A. Why, I think he had a very good income.
Q. Yes; you think that because he denied you nothing, and was a generous provider; is that what you mean?
A. That is it.
Q. You know nothing of his income from what he told you?
A. No, sir.

Recross-examination:

Q. He did not even have a book of account in his office, did he, Mrs. Adams?
A. No, sir.

Re-redirect examination:

Q. I will ask you, in that connection, if during Mr. Adams' residence in Spokane he ever had a law partner?
A. No, sir; he never had.
Q. Was anybody ever interested in his business in any way, as partner or otherwise?
A. He was alone all the time he was here in Spokane.
Q. You simply know that no account book was found of Mr. Adams' transactions?
A. That is all I know about it.

223 Re-recross-examination:

Q. Mrs. Adams, where did you get the idea that it cost in the neighborhood of twenty thousand dollars to rebuild that house?

A. From looking over the accounts and things that we had, of what it cost; and from my personal knowledge of what—how much each set of workmen were paid for what they did.

Q. How did you know what they were paid? Were they paid in money or paid by checks, or how?

A. They were paid by checks.

Q. They were paid by checks. Who drew those checks?

A. Mr. Adams.

Q. Did he show you the checks?

A. He showed me the receipted bills.

Q. He showed you the receipted bills?

A. And the accounts.

Q. What did you do with those receipted bills, Mrs. Adams?

A. We have them.

Q. You have them still?

A. Yes, sir.

Q. Would you have any objection, when you come back to-morrow, to bring them with you?

A. I cannot bring them with me, because they are not here.

Q. Where are they?

A. They are in my home.

Q. Where is your home?

A. San Francisco.

Q. You have removed now to San Francisco?

A. Yes, sir.

224 Q. How long have you been there?

A. I have been there some months.

(Excused.)

FRANK H. ADAMS, one of the plaintiffs, testified:

Direct examination.

(By Mr. C. S. VOORHEES:)

Q. Your name is Frank H. Adams?

A. Yes, sir.

Q. You are one of the plaintiffs in this cause?

A. Yes, sir.

Q. The surviving son of Jay H. Adams?

A. Yes, sir.

Q. How old are you, Frank?

A. Twenty-three.

Q. What is your occupation?

A. I am at present working in the insurance business.

Q. When did you last see your father, Frank?

A. It was the last of August, 1898.

Q. Where did you see him?

A. At the depot of the O. R. & N. railway.

Q. Under what circumstances did you see him at the depot of the O. R. & N.?

A. He went down to the depot to see me off, on my way south.
Q. On your way south. Where were you going south?
A. To Stanford university.
Q. How long had you at that time been at Stanford university?
A. Two years.
225 Q. At the time of his death what class were you in at Stanford university?
A. I was in the junior class.
Q. And when had you started the junior year?
A. I started the junior year that fall, the fall of his death.
Q. The fall of your father's death. And how long would you have required to remain at Stanford university before completing your graduation?
A. At the time of his death, it was something over one year; about one year and a half.
Q. What was the intention of yourself and your father as to whether or not you should complete your college course at Stanford university?
Mr. THOMPSON: If your honor please, I desire to object to this testimony for two reasons; and one of them will only be apparent if I am permitted to simply ask one question; and I want to ask the witness that question—as to whether or not you were, after your father's death, appointed as administrator?
A. Yes, sir; I was.

(Cross:)

Q. And you have been ever since, and are administrator of the estate?
A. I am.

Mr. THOMPSON: Now we object, if your honor please, to his testifying what the decedent may have said, or what the intentions of the decedent were with regard to him, both upon the ground that the testimony is entirely incompetent as to what he said or what his intentions might be, because he could only gather his in-
226 tentions from what he said in any event; and in the next place, the administrator would have no right to testify to those things in favor of the decedent which occurred before the decedent's death, and before his appointment as such administrator.
Mr. C. S. VOORHEES: That perhaps might be so, if he was suing as administrator.
The COURT: He is not suing here as administrator.
Mr. THOMPSON: I understand that, but I want to save that objection.
(Objection overruled, exception allowed defendant.)

A. I was to complete my course there; yes, sir.
Q. And graduate?
A. Yes, sir.
Q. What was the cost of your attendance at Stanford university, Frank.

A. About six hundred dollars a year.
Q. Did that include everything? Did it include your clothing?
A. No, sir; it did not.
Q. What did your clothing cost in addition to that?
A. Well, I could not say as to that; I never saw the bills. They were sent to father, and he paid them.
Q. You have no approximate idea—or idea of the approximate cost of your clothing?
A. Well, I could give a figure, but it might be far from what it actually cost.
Q. Very well. Who supplied you the means for paying your expenses at Stanford university?
A. Father did.
227 Q. And who paid the bills for your clothing?
A. Father did.
Q. What was the purpose of your father and yourself as to what you should do after you had completed your college course, at Stanford university?

Mr. THOMPSON: The same objection, if your honor please, and for the same reasons.
(Objection overruled. Exception allowed defendant.)

A. I was to study law.
Q. You were to study law. What were you to do in the prosecution of the study of the law, as to attending any law college?
A. He wanted me to attend some law college.
Q. Yes.
A. And had settled upon Harvard as the best.
Q. Yes; and what were you to do after you went to Harvard law college, with reference to completing the course there? What were you to do at Harvard law college with reference to completing the course?
A. I was to complete the course there given, in the law.
Q. Do you know, Frank, what the cost of the Harvard law course would be?

Mr. THOMPSON: We object, if your honor please, that that question is utterly immaterial. The question of the benefit that he would derive would be simply the benefit of the institution; and that question is wholly immaterial and incompetent.
(Objection overruled. Exception allowed defendant.)

228 Q. I ask you if you know?
A. It would cost me——
Q. No, I ask you first if you know about what the cost of the course would be at Harvard?
A. I could approximate; yes, sir.
Q. Now, you may tell the jury.
A. I think about eight hundred dollars a year.
Q. And how long was the law course—how many years?
A. I think the course is three years.
Q. What means, what source of income did you have for the pay-

ment of the cost of attendance at Harvard law school other than that afforded you by your father?

A. None whatever.

Q. What was your purpose and the purpose of your father, that you should do after leaving Harvard law school?

A. I was to go into his office and practice law.

Q. Were you to practice law from the beginning, from the time you went into his office?

A. Well, I suppose so. He said that I could go into his office and learn the routine of the work, and afterwards go into partnership with him.

Q. And during this time that you were building up a capacity for dispatching business yourself, what was the intention of your father as to your support and maintenance?

Mr. THOMPSON: We desire to make the same objection, and preserve the same exception as to the former evidence of this character.

(Objection overruled. Exception allowed defendant.)

229 A. I would have no support except that which he gave me.

Q. Do you remember your father's watch?

A. I do.

Q. Where is that watch now?

A. In San Francisco, California.

Q. What, Frank, was your father's habit as to making you gifts?

A. Well, he gave me a great number of gifts from time to time. He offered me a great many more than I felt willing to accept.

Q. What was your father's character and habit about the house, as to the care and attention which he bestowed upon your mother and yourself?

A. We had every care and attention that he could give. He was very liberal in every way. Very kind to us.

Cross-examination.

(By Mr. THOMPSON:)

Q. What were the gifts? Name some of them, that your father gave you, Frank.

A. Well, he gave me a wheel.

Q. A bicycle?

A. A bicycle; yes, sir.

Q. What else?

A. And then I rode that for a while, and I got another one.

Q. Had two, then?

A. I had two, yes, sir.

Q. Well, what else did he give you; any more wheels?

A. He gave me a watch; it was about my twentieth birthday.

230 Q. On your twentieth birthday he gave you a watch?

A. Gold watch and chain, yes, sir.

Q. The same one your have on now, is it?

A. Yes, sir.

Q. What kind is it?
A. It is a gold watch, as you can see (exhibiting it).
Q. Open face?
A. Open face.
Q. And what else, Frank?
A. Whenever I wanted to go any place, he would give me the money to take the trip.
Q. Always supplied your wants whenever you wanted to go away?
A. Yes, sir. And if I ever wanted anything he always supplied it.
Q. Any other tangible gifts besides money that he supplied you with?
A. I cannot think of any one; no, sir. He gave me several guns. I had a rifle and shotgun. He gave me a row-boat and supplied me with fishing tackle, and everything like that—anything that I wanted.

Redirect examination:

Q. Did he present you with any books?
A. Yes, sir; I accumulated quite a library. I always had all the magazines, and any new book that I saw that I wanted, why I got.

Mr. C. S. VOORHEES: There is something that I wanted to ask that I omitted in the direct.
Q. You remember the cost of the burial of your father?

231 Mr. THOMPSON: We object to that, your honor, as it is wholly incompetent and immaterial; it would not fix any right of recovery, or any ground for damages. It would not be competent in any possible direction. It is a question with the administrator and the family entirely.
Mr. C. S. VOORHEES: We have alleged, if your honor pleases, that it cost four hundred and twenty-four dollars.
The COURT: I will let you prove it.
(An exception allowed defendant.)

Q. I ask you if you know the cost of the interment of your father?
A. When you first asked, I did not know the actual cost. I knew it was something between four and five hundred dollars; that would have been my answer.
Q. Yes. Now, then, to refresh your recollection, wasn't it four hundred and twenty-four dollars?
A. Yes, sir, it was.
Q. After your father's death, you may state what, if any, sum of money was paid to you for services rendered by your father in his lifetime?
A. I got several amounts, from different parties.
Q. Do you remember a sum of money paid by the Iron Horse Mining Company for services rendered by your father to that company during the last year of his life?
A. Yes, sir; I do.
Q. How much was that?

A. My recollection is now that it was two hundred and fifty dollars.

232 Q. Did you collect any other sums of money for services rendered by your father which were unliquidated at the time of his death?

A. There was one sum that was in connection with some bank.

Q. The First national bank in liquidation?

A. Yes, sir.

Q. Do you remember that amount?

A. I think it was about a thousand dollars.

Q. Do you remember any other sums collected by you after his death?

A. There were several, for work done, partial work done on cases, twenty-five or fifty, small sums.

Q. Do you remember the amount paid to you after your father's death, for services rendered by you- father during the last year of his life, by the Old national bank?

A. I remember that there was a sum paid by the Old national bank.

Q. Do you remember how much?

A. I think it was in the neighborhood of two thousand dollars.

Q. One thousand eight hundred, wasn't it?

A. Yes, sir; about that.

Q. Something like one thousand eight hundred dollars?

A. Yes, sir.

Q. If Mr. Thompson won't object, I will ask you if Mr. Sherman did not pay you twenty-five dollars?

A. Yes, sir; he did.

Q. For some services rendered. And if Mr. Doland did not pay you twenty-five dollars?

A. He did.

233 Recross-examination:

Q. You collected these as administrator of the estate?

A. I did.

Q. And as administrator of the estate you would know more about it than any other person, would you not?

A. I would know the facts; yes, sir.

Q. You have had to account for every dollar of it, haven't you?

A. I did.

Q. As administrator, and you kept a book showing the amount that you paid, didn't you?

A. Yes, sir.

Q. Have you a memorandum book showing the amounts paid?

A. Not with me, no, sir.

Q. Haven't it here at all?

A. No, sir.

Q. Taken it to California with you?

A. It is down there with the other papers.

Q. And you have not any memoranda of any kind with you that would show what you received as administrator?

A. I have a small memorandum, I think.
Q. Didn't you make a report as administrator, to the court, showing what sums had come into your hands since his death?
A. A report was made out, yes, sir.
Q. And you put that report in court, didn't you? You signed it, and swore to it?
A. I signed it; as to its being in court, I do not know.
Q. You don't know whether it was ever filed or not?
A. No, sir.
Q. Who did you give it to after you signed it?
A. Messrs. Voorhees & Voorhees.
234 Q. You don't know whether they filed it or not?
A. I do not.
Q. That report showed all the sums that you received, did it not?
A. Yes, sir.

Re-redirect examination:

Q. You gave that report to me (Mr. C. S. Voorhees), did you not?
A. Yes, sir.
Q. And I told you the other day that it had not yet been filed, did I not?
A. Yes, I believe you did.

Mr. C. S. VOORHEES: The report is in the office, and Mr. Thompson may see it if he likes.
Mr. THOMPSON: I would be obliged if you would bring it down to-morrow.
Mr. C. S. VOORHEES: The report is there. I simply make this statement in order that it may not be understood that Frank is remiss. If there is any remissness, it is my own.
Mr. THOMPSON: We will take that for granted.
(Excused.)

(Whereupon an adjournment was taken until to-morrow, December 1, at 9.30 o'clock a. m.)

STEPHEN H. SMITH, testified as follows:

Direct examination.

(By Mr. R. H. VOORHEES:)

Q. State your full name.
A. Stephen M. Smith.
235 Q. Your residence?
A. Spokane.
Q. Occupation?
A. Undertaker.
Q. Age?
A. Forty-nine.
Q. How long have you been in that business, Mr. Smith?
A. More or less for thirty-five years.

Q. Is embalming a part of your business?
A. Yes, sir.
Q. How long have you been engaged in that?
A. About fifteen years.
Q. What knowledge of the circulatory system, the arterial system, and the blood-carrying vessels of the big arteries of the chest does that require?
A. It requires us to know the circulatory system, the arterial and venous system.
Q. You received an instruction of that kind preliminary to doing this work?
A. Yes, sir.
Q. You buried the late Jay H. Adams, did you not?
A. Yes, sir; I did.
Q. Did you prepare him for burial?
A. Yes, sir.
Q. Was he embalmed?
A. Yes, sir.
Q. You did it?
A. Yes, sir.
Q. Please state where you came into possession of the body, Mr. Smith, and at what time.
A. The Northern Pacific depot.
Q. Do you remember the time?
A. About 9 o'clock at night. I don't remember the date now. I could not state without referring to my record.
Q. The body was clothed at the time?
A. Yes, sir.
236 Q. In preparing the body for burial you removed the clothing?
A. Yes, sir.
Q. Please state the condition of the body, Mr. Smith, when you examined it, with regard to wounds, or other evidences of injury about it.
A. The body was frozen when I received it. I found the wound on the temple, which I think, as I remember it now, was on the left temple. The skull was from a quarter to three-eighths of an inch think. That wound, the skull was split or separated, there was a piece of the skull probably an eighth of an inch thick, attached to the skin, scalp, about the size of a small hen's egg, and was hanging by a part of the skin.
Q. The scalp was sheared off, you say, and hung down?
A. The skull?
Q. Yes.
A. With the skin attached. The skull, a piece about an eighth of an inch thick, I should judge, as I remember it now.
Q. That piece of skull remained on the hanging piece of skin?
A. Yes, sir; not detached from the skin.
Q. What other evidences of injury about the face, if any?
A. The nose was broken and crushed in; the left eye was entirely out.

Q. That is, the ball broken?
A. Yes, sir.
Q. Collapsed?
A. Yes.
Q. Anything about the mouth, the lips, as you remember it?
237 A. Yes, there was; the upper lip was cut from the nose down.
Q. You arranged that at the time?
A. Yes, sir.
Q. Anything about the head?
A. Yes, sir; there was a scalp wound on the back of the head.
Q. Any blood about the ears?
A. Yes, sir.
Q. Running out of the ears?
A. Bled from both ears; and nose.
Q. What about the body, now, Mr. Smith?
A. There was a wound in the back, a right or nearly right-angled wound, about three-quarters of an inch in length, about midway between the vertebræ and the shoulder-blade.
Q. On which side?
A. The left side.
Q. Describe the character of that wound quite fully, Mr. Smith. You say it was a triangular wound, something like that you mean (indicating)?
A. Yes, sir; not so large.
Q. Explain it to the jury.
A. Well, if you will let me have your pencil. (Witness makes diagram.) It was something like that. This part, this V-part here, was set into the back, as though it had rested on something and frozen so; so that it remained in there, I should judge, probably a quarter of an inch, right in there.
Q. Now, this is one cut along there, and this is another cut along here (indicating)?
A. Yes; but stopping there.
238 Q. Stopping there?
A. Yes, sir.
Q. And then this is not a cut that connects (indicating)?
A. This is not a cut.
Q. No, that is not a cut. And here is the skin running right along the back, right into that triangular cut?
A. Yes, sir.
Q. And you say that that triangular portion was pushed in?
A. Yes, sir.
Q. And remained indented in when you saw it?
A. Yes, sir. Then when I commenced embalming him I discovered that the fluid discharged there, and I looked to see where it discharged from.
Q. Was there any bruising about the wound, discoloration of the skin about the wound itself?
A. Yes, sir; it was the pink color which would naturally come anyway, as the body evidently lay on its back, and the blood set-

tled in the lower extremities; so the back was all discolored, as is usual.

Q. The edges of the wound ragged and lacerated, or otherwise?

A. It evidently was not made with a sharp instrument. I did not examine it very closely.

Q. In your business you see all sorts of injuries, and wounds?

A. Yes, sir.

Q. What impression did you derive from the character of the wound, as to the nature of the object that had made it?

Mr. THOMPSON: We object, if your honor please, as to his impression. He states the facts and circumstances; he cannot give simply his impression.

239 Mr. C. S. VOORHEES: He states that he has examined many wounds; I think it is quite competent.

The COURT: I overruled the objection. The witness can give the best information or knowledge he has on the subject.

A. Why, I drew the conclusion that, knowing that Mr. Adams had fallen off of the train, or in the way that he had, and had been found, that that was probably done from something that he struck on when he fell from the car.

Q. A blunt, rough object?

A. Yes, sir—I don't know as I could say that I formed that opinion from the wound itself. Still, if it had been a wound done with a sharp instrument, it would have been more apt to attract my attention, because it appearing as though it was done from a fall, some blunt instrument.

Q. Something pushing that piece of the wound in?

A. Not so much that, but the nature of the cut.

Q. You judged from the triangular nature of the cut?

A. No, sir; from the edges.

Q. The ragged edges; they were ragged?

A. Although I did not examine the wound closely; I did not have any idea that I would ever be called upon to give testimony.

Q. But that was the character of the wound—a ragged wound?

A. Yes, sir; as I remember it now.

Q. Where did you inject the embalming fluid, Mr. Smith?

A. Into the brachial artery.

240 Q. Where is that? That is up in the arm?

A. Yes, sir; between the elbow and the shoulder.

Q. Preliminary to doing that, had you examined the chest, as to whether it had fluid in it or not?

A. Yes, sir.

Q. Find fluid in it?

A. I found fluid in both pleural cavities.

Q. What was the fluid?

A. Blood.

Q. In both?

A. Yes, sir.

Q. When you injected the embalming fluid, what did you notice with reference to the wound in the back of the chest?

A. I noticed my fluid was escaping, that I was injecting.
Q. The embalming fluid?
A. Yes, sir.
Q. What condition of the blood vessels in the chest did that indicate to you?
A. A rupture.
Q. Some rupture within the chest?
A. Yes, sir.
Q. Did the fluid make its appearance elsewhere than through the opening in the back?
A. Through the mouth and nose.
Q. What would that indicate to you as to the condition of the lungs, within the chest?
A. That there was a rupture in the tissues.
Q. Now, Mr. Smith, what were the conditions of the arms?
A. The left arm was broken between the wrist and the elbow, I think twice; I think there were two fractures. The skin was bruised considerably on the hands, I think both hands, the
241 left hand I am positive, there were more or less of those bruises upon the hips, down both limbs; just the skin scratched over, so that the blood showed through on the surface.
Q. Did you notice the condition of the left hand?
A. The left hand was considerably scratched, the back of it; just the skin rubbed off.

Cross-examination.

(By Mr. THOMPSON:)

Q. The wound that was in Mr. Adams' back that you speak of, penetrated to the cavity of the body, did it not?
A. I could not say that it did, no, sir.
Q. You had no evidence of that from the outflow of the fluid?
A. No, sir.
Q. You could not tell anything about how deep that was? The only thing that you could know was that an artery at least had been cut that connected with that opening?
A. That is all I knew about it then, yes, sir, or now, because I did not make any examination.
Q. Because you did not make any examination. Only that one of the arteries had been cut at that point, so as to enable the fluid to come out at that opening?
A. Yes, sir.
Q. And that opening, instead of being large, like Mr. Voorhees has drawn there, was only about three quarters of an inch in extent, like the smaller point that you have drawn here?
A. Yes, sir; it would be about the same as if you took a felt hat and cut a three-cornered hole in that and dent the point in about a quarter of an inch.
242 Q. In other words, as though some pointed object of a triangular shape with more or less rough edges had been thrust into the flesh at that point?

A. Well, I drew that conclusion, knowing how Mr. Adams came to his death.

Q. Knowing that it was supposed that he fell from the train upon the rocks?

A. Yes, sir.

Q. You just drew that conclusion. If you had known that he had been struck with some instrument and caused his death, you would have drawn another conclusion, wouldn't you?

A. Possibly.

Q. In other words, there was not anything about the wound to particularly inform you what would likely have caused it?

A. No, I don't know that there was. I don't know but there was. If there was I don't know as I took particular notice.

Q. In other words, your impression about what probably caused the wound was from your outside knowledge, as to Mr. Adams' disappearance from the train, and his being found in the place where he was?

A. Yes, I might say that, and I might say no. I have some knowledge about the difference between the blunt instrument appearance of a wound, and a sharp instrument. A sharp instrument makes a wound so that the fatty matter turns out—rolls out. This was not the case.

Q. This was driven in?

A. Yes, sir.

Q. Now, there would be no difference whatever in the character of the wound, if a man had fallen on a proper instrument to
243 make that, or had been struck with a similar kind of an instrument; the blow would be the same and the effect the same?

A. Yes, sir.

Redirect examination:

Q. You do not wish to be understood that you knew from the flowing out of the fluid or the presence of blood in the pleural cavities, Mr. Smith, that the artery had been cut, as distinguished from being broken, do you?

A. No, sir. The result of my work would be the same whether it was cut or whether it was ruptures in any way.

Q. You would not know how the hole in the vessel was made, otherwise than that the hole was there, because the blood escaped; isn't that so?

A. Yes, sir.

Q. And isn't it further a fact that a fall of a heavy body like that for a considerable distance, would rupture the large vessels in the chest, mayhap the heart and mayhap the lung?

A. It would have a tendency to, yes, sir.

(Excused.)

(Whereupon court adjourned until 1.30 p. m. to-day.)

W. BROBERG, testified as follows:

Direct examination.

(By Mr. REESE H. VOORHEES:)

Q. Please state your name, Mr. Broberg.
A. W. Broberg.
Q. What is your age, Mr. Broberg?
A. Thirty-eight.
Q. And what is your business?
244 A. I am city passenger and ticket agent for the Great Northern road.
Q. How long have you been in the railroad business?
A. Since 1887.
Q. How long have you been connected with the Great Northern road?
A. From 1889 to 1894 and then from 1897 to the present time.
Q. At what points were you during your connection with the road?
A. St. Paul and Spokane.
Q. What is your business—what are the duties of your position, Mr. Broberg?
A. To solicit business—that is, solicit passenger business and to sell the tickets.
Q. That carries you to and about the trains?
A. Yes, sir.
Q. What means, if any, Mr. Broberg, were in use on the Great Northern road prior to November 13th, 1898, of closing in the platforms of the cars?

Mr. THOMPSON: We object, that the evidence is incompetent, irrelevant, and immaterial, does not have any tendency to support any issue in this cause.

The COURT: I do not think it is competent for you to make a comparison with any other particular road. If you are going to follow this up, to show the system in general use on railroads in this country, I will allow you to introduce that evidence, but not simply to enter into a comparison between the Northern Pacific and Great Northern.

245 Mr. REESE H. VOORHEES: I am not going to make any comparison, your honor. I am going to show that there are ways of closing the platforms which could have been adopted by the Northern Pacific. Our complaint charges, in the 14th paragraph: "That said defendant company carelessly and negligently left an opening at the side of the platform of one of the cars on said train used for entrance and exit unguarded while said train was in motion, and that while passing over said platform, as aforesaid, through and because of defendant company's failure to guard said platform, deceased was precipitated through said unguarded opening by means of said train and killed." The act is the omitting to guard, and we say that it was negligently done and any evidence it seems to me, which shows the negligence, tends to show the

negligence, is quite competent under that allegation. If there were no means in use or known to guard that opening, to omit to guard it would not be negligence. If we can show that there are means in use known, practical, used to guard that opening, the omission to use them clearly become negligence, and to show that the means are in existence and used is the only way we have of proving the negligence. I have some authorities here, if your honor would care to see them or listen to them, but it seems to me that it is the only method that we have to prove that the omission to guard, to put in gates or a bar is to show that gates and bars were in use and could and did make a platform safe.

246 The COURT: I will allow you to prove that those means were in use. I suppose you were going to make an argument based on the comparison of one car company with another one.

Mr. REESE H. VOORHEES: Not at all.

The COURT: Boom the Great Northern here at the expense of the Northern Pacific, showing they had better appliances.

Mr. REESE H. VOORHEES: No, I have no desire to do that.

The COURT: I will allow you to inquire of the witness as to what he knows of the means and appliances provided for platforms.

Mr. REESE H. VOORHEES: That was the full scope of my question.

Mr. THOMPSON: If the question is asked in the form in which it is asked we desire an exception.

The COURT: I sustain the objection to the question. I think it is objectionable on the ground I have stated. You can inquire as to what knowledge he had about the means and appliances in use on the railroad.

Q. Mr. Broberg, I will inquire of you what knowledge you have of the means in use prior to November, 1898, for the purpose of guarding and enclosing the sides of the platforms of cars?

A. On the Great Northern?

Mr. THOMPSON: Now, we object to the witness stating the very matter prohibited by the court. If he knows that there are means, he can state and describe them, but not what he starts to state.

247 The COURT: Yes, you may not inquire of Mr. Broberg to state particularly what there is on any particular road, but if you know of any means that are in use on any railroad you can state and then describe what it is.

A. There has an iron gate been in use on the platforms of the coaches which, when the train is started and in motion, is closed by the trainmen.

Q. Just where were those gates placed? You have seen those gates yourself in use, Mr. Broberg?

A. Yes, sir.

Q. For how long have you seen them in use?

A. The exact time I do not remember; about eight years, I think.

Q. Now, Mr. Broberg, just where were these gates placed? Suppose that I am now standing on the platform and that is one way down the steps off of the train and this is the other way down the other steps off the train, and the other car is in front of me, and I stand in front of the door of the coach, out the door of the coach which I have just come and stand on the platform, where would the gates be?

A. I should think somewhere about the edge of that table; that would be about the distance from the door.

Q. So that they would close up the space through which you pass to and from the platform to get on and off the car?

A. Yes, sir.

Q. That would be, then, just at the top of the steps on which you came up on a car?

A. Yes, on the platform.

248 Q. On the platform. The opening into a car in front would be left there so that you could pass through into the car in front?

A. Yes, sir.

Q. But the opening at the side, at the top of the steps would be closed up?

A. Would be closed up.

Q. Those gates were fastened, Mr. Broberg?

A. They were fastened with an iron clasp.

Q. So that they would not come open except the clasp were loosened?

A. Yes.

Q. What would be the effect, Mr. Broberg, in preventing a person from being thrown off or falling off of the platform?

Mr. THOMPSON: We object to the witness giving his opinion as to what the effect would be. Any person is as well qualified to judge what the effect is as he would be.

(Objection overruled. Defendant allowed an exception.)

Q. What would be the effect in preventing or otherwise a man from falling or being thrown from the platform while crossing the platform to go into the dining-car?

A. The gates close toward the body of the car, and unless the gate broke he would not fall through.

Q. Then if the gate closed on both sides of the platform—they were in use on both sides of the platform, Mr. Broberg?

A. Yes, sir.

Q. In passing across the platform from one car to another there would be no opening through which a person could fall or be thrown from the car?

249 A. There is a small opening which would be left on account of the coupling between the cars.

Q. That would be between the two hand-rails?

A. Yes, sir.

Q. A body could not be thrown through there, could it?
A. No, the space is not very large.
Q. A medium-size man could not be thrown through there?
A. No.
Q. In the use of these gates, as you have seen them in use, Mr. Broberg, were they used throughout the train?
A. I have seen cars without them.
Q. And when you have seen them what was the custom, what was the general way in which they were used with reference to being used throughout the train?
A. Generally next to the baggage-car; they would not be used in the smoking-car.
Q. I am speaking of how generally the gates were used throughout the train?
A. I don't understand you?
Q. Was the practice to use them on all the cars?
A. Yes, sir; except the front car.
Q. Except what?
A. Except if there was a car without a gate it would be put on in front next to the baggage-car.
Q. Have you seen these gates used on tourist sleeping-cars Mr. Broberg?
A. Yes, sir.
Q. Have you known them to be used there for a long time or a short time?
A. For the length of time I have stated, about seven or eight years.
250 Q. What is the character of the gate, Mr. Broberg? Something like this gate (referring to gate in courtroom)?
A. It is not as solid as that, because it is an iron gate.
Q. Lighter than this one?
A. Yes, sir; it is not solid; it has spaces something like this between. (Indicating between the railings.)
Q. With bars to it; perhaps lattice-work?
A. Lattice-work, yes.
Q. And a little lighter than this, you think?
A. But there are several kinds of gates.
Q. Those you have seen?
A. Those I have seen.
Q. And attached to the car by means of hinges?
A. Yes, sir.
Q. How many?
A. Not less than two.
Q. Two hinges. Right on the end of the car?
A. Each end of the car.
Q. So that is the end of the car which would be attached like that?
A. Of course it is shut up between the end of the car, between there and the door.
Q. Assuming that to be the end of the car, and the door over there?

A. Yes, sir.
Q. When in place that way?
A. Yes, sir.
Q. This being the hand-rail at the end of the platform (illustrating); this being the end of the car?
A. The end of the car, that is correct.
Q. This being the space where the steps are by which you mount into the car; and here is a gate?
A. Yes, sir; that is correct.
Q. When it is closed it closes up that space like this;
251 when it is open for people to go in and out it would be that way?
A. Close against the car, yes, sir.
Q. How high is that, Mr. Broberg?
A. It may be a trifle higher than the gate there from the platform, but very little higher, I should judge; probably about four feet high from the platform proper.
Q. A little higher than the ordinary hand-rail at the end of the platform?
A. No.
Q. About the same?
A. About the same as an ordinary hand-rail.

Cross-examination.

(By Mr. THOMPSON:)

Q. Such a gate as that you have described, is that shut below the hand-rail or above?
A. Just below the hand-rail, if I remember right.
Q. How much below the hand-rail?
A. I never measured the space; I know just below, not far.
Q. Now, that hand-rail joins to the side of the car three feet and four inches above the platform of the car, does it not?
A. I don't know; I never measured that space.
Q. You never paid any particular attention to the height of those gates as you have seen them?
A. The only thing I can say is it is just about probably a little higher than the gate there.
Q. Probably a little higher than the gate. As high as the top of this post?
A. Just about.
252 Q. Have you ever had any experience in the making of cars or the planning and preparing of cars of that kind?
A. No.
Q. Did you ever have any experience in the operating of a train in any way?
A. No.
Q. Never served as a conductor or a brakeman?
A. No.
Q. Never had anything to do with the shop work on a railroad?
A. No.

Q. You don't know, then, anything, about what devices or schemes have been prepared for use in that way and tried and tested and thown away and others used?

A. No.

Q. Did you ever travel over any of the leading railroads—from St. Paul and Minneapolis, to Chicago?

A. Yes, sir.

Q. Have you been over the Burlington?

A. Yes, sir.

Q. Have you been over the Chicago, Milwaukee & St. Paul?

A. Yes, sir.

Q. Did you ever notice the tourist sleepers on those roads?

A. No.

Q. You never paid any particular attention to them?

A. No.

Q. Ever go through them?

A. No.

Q. Will you say to the jury that you ever saw a tourist sleeper on any of those great roads that either had such a gate as this that you have described upon it or had a vestibuled platform?

A. No.

Mr. C. S. VOORHEES: We object, as immaterial, incompetent,
253 and irrelevant. The question here is, and this witness was examined on the point as to whether or not this safety device was in known practical use. If it was in known practical use it would make no difference whether it was employed on all of the roads or whether it was not employed upon all of the roads.

The COURT: Not as a fact, but these questions are put to this witness as a means of testing him as a witness; that is competent to testify about the proper construction of a car.

Mr. C. S. VOORHEES: He has not testified about the proper construction of the cars, merely the fact that the gate was in use.

The COURT: The question goes to test him as a witness who has observed, and how much he has observed. I think it is proper in cross-examination.

(Overruled. Plaintiffs allowed an exception.)

Redirect examination:

Q. I intended to ask this question on the direct examination. Is the vestibuling appliance in use on the Great Northern road now, Mr. Broberg, or was it at any time prior to 1898?

Mr. THOMPSON: We object for the same reason.

(Objection sustained.)

Q. Did you ever know, Mr. Broberg, a railroad to adopt the vestibuling appliance and within what time from the beginning of the adoption was the adoption of the appliance generally completed?

A. I don't understand that question.

254 Q. In your familiarity with railroads have you ever known, been cognizant or familiar with the beginning of the adoption

of the vestibuling system by a railroad. Have you ever known when the railroad began using it?

A. Eastern roads have used it a good many years.

Q. Have you ever been connected with a railroad at the time it began the adoption of the vestibuling system?

A. Yes.

Q. I will ask you whether the railroad continued its adoption to a general vestibuling of substantially all of its cars for through service?

Mr. THOMPSON: We object on the ground that what he may have known of what one railroad has succeeded in doing would be incompetent, irrelevant, and immaterial.

Mr. REESE H. VOORHEES: It is perfectly competent to show within what time the vestibule device can be adopted, your honor, on the question of negligence.

The COURT: I will allow this question. The defense will go into that question, I am pretty sure.

A. As far as I can remember, in about eight months' time.

Q. You think that from the time the railroad with which you are familiar began to adopt the vestibuled appliance until it had substantially vestibuled throughout for through service, it was about eight months?

A. As far as I can remember, about eight months.

255 Recross-examination:

Q. What road was that?

A. The Great Northern.

Q. And you think the Great Northern Railway Company practically succeeded in vestibuling its trains in eight months?

A. Its through trains.

Q. Has it got a through train on its road now that is vestibuled from one end to the other?

A. Except the smoking-car.

Q. What is that?

A. Except the car which I mentioned before, the car ahead, the smoking-car.

Q. The smoking-car, it has not got that vestibuled has it?

A. No.

Q. How many smoking-cars has it got?

A. I don't know.

Q. You know when the Great Northern did commence vestibuling its trains?

A. As far as I can remember it is—I am unable to say the particular year; it was either the summer of 1897, or 1898.

Q. Summer of 1897 or 1898. You don't know as a matter of fact then that the Great Northern Railroad Company had a lot of its cars unvestibuled here in Spokane?

A. No.

Q. Practically all of its sleepers?

A. No, I do not know.

Q. You don't know anything about that?

A. No.

256 Q. You will not say that that is not true, will you?

A. No, I will not say that it is not true.

Q. Now, as a matter of fact, did you ever in your life see a fully vestibuled train?

A. Yes.

Q. Where?

A. Between St. Paul and Chicago, the Northwestern Limited.

Q. On what road?

A. On the Northwestern Limited.

Q. On the Northwestern Railroad, Limited. That is a limited train, what is called the Limited on the Northwestern. When did you see that?

A. Ten months ago.

Q. Ten months ago. But I mean before November 13th, 1898?

A. I did not see it before, because I was not in the east for four years.

Q. You can't say that you ever saw a train of that kind before November 13th, 1898, on any railroad in the United States?

A. I do not remember of it.

Q. Now, as a matter of fact, the tourist sleepers running over all the roads were the last cars that began to be vestibuled, were they not, generally on all the roads, they were the last cars that began to be vestibuled?

A. I don't know.

Q. Do you know anything about the vestibuling device, as to whether or not it is one that is patented and manufactured by certain companies?

A. I do not.

Q. You don't know anything about that?

A. No.

257 Q. Do you know whether the railroads have any right to make them themselves or not?

A. No.

Q. And you don't know whether these companies can turn them out as fast as the railroad companies are calling for them?

A. No.

Q. You don't know anything about that, then?

A. No.

Q. For aught that you may know the railroads of the United States have been for the last seven or eight years with their orders into those companies and trying to get the cars, for aught that you know?

A. Yes, sir.

Q. You say, Mr. Broberg, on the smoker there was no vestibule. What was there on the smoker when it was not vestibuled if anything?

A. There are some smoking-cars with guards and some without.

Q. When the smoker is unguarded, didn't I understand you to

say that when it was unvestibuled, it was carried at the head of the train?

A. Yes, sir; it is so now.

Q. That would be next the baggage or express-car?

A. Yes, sir.

Q. So that in passing from toward the diner, the smoker would not be in the middle of the train, it would be up at one end?

A. One end.

Q. The smokers are, as a general rule, gated, are they not, with all of the other cars?

A. They are gated, but there are some smokers without gates.

Q. But the rule is, gated?

A. Yes, sir.

258 Q. The ungated car will be an exception to the rule?

A. Well, I won't say for sure whether it is an exception or not, but I have seen some ungated cars, and some with gates.

Q. It would not make any difference whether those cars are gated or ungated, these smoking-cars are carried at the front end of the train, are they not?

A. Yes, sir.

Q. Anybody who is in the smoking-car and going back to the dining-car would have to pass over the ungated platform, if it was an ungated smoker, would they not?

A. Yes, sir.

(Excused.)

F. W. GILBERT, testified as follows:

Direct examination.

(By Mr. C. S. VOORHEES:)

Q. You are Mr. F. W. Gilbert?

A. E. W. Gilbert.

Q. Superintendent of the Northern Pacific?

A. Yes, sir.

Q. I ask you to look at this paper. On the back of which is "Northern Pacific Railway Company, Idaho division, No. 7*a* time table to take effect at 12:01 a. m. (Pacific or 120th meridian time); one hour slower than mountain, or 105th meridian time. Monday, September 12th, 1898," and on the first page of that, that is inside page, please state to the jury what that represents.

A. The first page of this time table represents the time
259 schedule of the trains on what is known as the first district, between Hope and Spokane.

Q. And that correctly represents the stations and the time of leaving?

A. Yes, sir.

Q. The time of leaving those stations?

A. Yes, sir.

Q. Leaving Hope at 1:05, passing through the various other stations, and arriving at Spokane at 3:30 p. m., that is right, is it?
A. Yes, sir.

Mr. C. S. VOORHEES: I offer the first page.
Mr. THOMPSON: You mean that part of it?
Mr. C. S. VOORHEES: Yes, sir; that part of it, the time table, the columns between the pencil marks upon this slip, "Pacific Mail No. 1."
Mr. THOMPSON: Train known as Pacific Mail No. 1.

(The same is received without objection and marked Plaintiff's Exhibit "A 6.")

Cross-examination:

(By Mr. THOMPSON:)

Q. Now, taking the train known as Pacific Mail No. 1, I will ask you if that was the train that left Hope, Idaho, on the afternoon of the 13th of November, 1898.
A. Yes, sir.
Q. That would be that particular train?
A. Yes, sir.
Q. Now, the schedule given there is the running time of that train from station to station when the train is on time?
A. Yes, sir.
260 Q. What was the fact at that date, along about November, 13th, 1898, the fall of the year, whether that train was usually on time or often delayed?
A. Frequently late.
Q. When the train was late, was it confined to that schedule at all?
A. No, sir.
Q. What had it to do with that schedule, if it was late?
A. Usually it ran so much later than the schedule; when late they ran to make up time.
Q. What is the fact as to whether it was the duty of the trainmen in charge of the train to make up time from Hope, Idaho, if the train was belated?
A. They were to make up time.
Q. That was the custom, was it?
A. Yes, sir.

CHARLES STEWART, testified as follows:

Direct examination.

(By Mr. C. S. VOORHEES:)

Q. What is your full name?
A. Charles Stewart.
Q. Where do you reside?
A. Spokane.

Q. What is your occupation?

A. Observer of United States Weather Bureau.

Q. How long have you been an observer of the United States Weather Bureau?

A. About between seventeen and eighteen years.

Q. Can you state to the jury, Mr. Stewart, the time when the sun set at Spokane on the 13th day of November, 1898?

261 A. Yes sir. (Referring to chart.) That is local time 4:25.

Q. Local time 4:25. How about Pacific time?

A. 4:15.

Q. 4:15 by Pacific time. By Pacific time, would that be the real time or the theoretical time?

A. The local time would be the real time.

Q. The Pacific time?

A. The Pacific time would be the real Pacific time, the time of the 120th meridian; that is Pacific time; that is the time that the sun would set.

Q. You say that the sun set at Spokane on the 13th of November, 1898, at 4:15 Pacific time?

A. At 4:15 Pacific time.

Q. Would the mountains around about Spokane affect or vary that time?

A. It would cause it to be a little earlier; that is, when the sun disappears below the horizon.

Q. Now, at what time would the sun set on that day at the town of Hope, being 85.1 miles northeast from Spokane, as to whether it would set earlier or later than it set at Spokane on that day?

A. What is the latitude of Hope?

Q. I assume that it is the same latitude as here.

A. If it is the same latitude as here it ought to set a little earlier than at Spokane.

262 Cross-examination.

(By Mr. THOMPSON:)

Q. What difference, if any, would it be north of here?

A. It probably would set a little earlier.

Q. The further north you go the earlier it would set. Is that it?

A. In winter time?

Q. In winter time.

A. Yes; would it not?

Q. Now, Mr. Stewart, as a matter of fact, in the winter time the sun does not come directly over us but makes a circle around to the south, does it not, sets in the west, sloping toward the north as it goes behind the horizon?

A. I don't understand your question.

Q. As a matter of fact, the further north you would go the nearer the sun comes of making a horizontal revolution around the earth instead of a perpendicular one over us; that is true, is it not, the further north you go?

A. That would depend on whether summer or winter.

Q. Doesn't it any time the farther north you get come nearer making a horizontal revolution around the earth. In other words, if you were at the north pole in the winter time the sun would be making an absolute horizontal revolution around the horizon, would it not, below the horizon?

A. It would be below the horizon in the winter time; yes, sir.

Q. But it would be going horizontally, around, instead of coming vertically forward, would it not?

A. I don't understand your question, what you mean by going horizontally instead of coming directly over.

263 Q. Mr. Stewart, the earth being a ball you are, wherever located, always upon the crest of that ball?

A. Yes, sir.

Q. Now, in the summer time, when the sun is at the equator, it rises almost directly in the east and comes almost directly forward and sinks almost directly in the west?

A. Yes, sir.

Q. The further south you go in the winter time the more of an ascendancy there is for the sun instead of coming up over you makes a circle around the southern horizon in that direction, does it not?

A. Yes, sir; in the winter time.

Q. In the winter time?

A. Yes, sir; twenty-three and one half degrees south of the equator.

Q. Then, as it sets, instead of setting perpendicularly down behind the horizon, it goes behind the horizon slanting?

A. Yes, but it does not set south of the latitude that the place is on, you know.

Q. Hope, as you understand it, is higher than Spokane, is it not?

A. I really don't know about the elevation of Hope, sir.

Q. Do you know where Hope is located?

A. I am told that it is about northeast of Spokane or somewhere in that direction.

Q. You know it is on the shores of Lake Pend d'Oreille and in the Rocky mountains, do you not?

264 A. Yes, sir.

Q. You know that the water flows from Lake Pend d'Oreille down past us through this country?

A. I believe it does; I am not certain of that.

Q. It must be higher than we are?

A. Yes; it is in that case.

Q. That would also make the sun set later?

A. Yes, sir.

Q. Now, when you say the sun set here at 4:23 local time——

A. (Interrupting.) 4:25.

Q. (Question continued.) 4:25 local time; you mean by that that is the actual correct time of sunset at this place?

A. Yes, within probably a fraction of a minute.

Q. And at Hope it might be a minute or two different from that?

A. Yes, sir; a minute or two earlier, according to the meridian.

Q. Say about 4:23 at Hope, or something like that?
A. Yes; probably 4:23 Spokane time.

Redirect examination:

Q. You say 4:23 Spokane time. Explain the difference between Pacific time and Spokane time so the jury will understand.
A. There is ten minutes difference. For instance, there is that clock; that has Pacific time, I presume; it is thirteen minutes past two; I think it is about thirteen minutes past two now, Pacific time, but the real Spokane time is twenty-three minutes past two.
265 Q. You mean the Standard Pacific time?
A. Yes; as I understand this Mountain time and Central railroad time, etc., that governs the time throughout the United States now; there is a difference of ten minutes. The true local time at Spokane now is about twenty-four minutes past two, but that is Pacific time, and you see it is off ten minutes.

(Excused.)

E. P. PENFIELD, testified as follows:

Direct examination.

(By Mr. REESE H. VOORHEES:)

Q. Please state your name and residence.
A. Dr. E. P. Penfield, Spokane.
Q. What is your profession?
A. Physician.
Q. Age?
A. I am sixty-seven years old.
Q. How long have you practiced medicine, Doctor?
A. Since 1857, over forty years.
Q. Were you acquainted with Mr. Jay H. Adams during his lifetime?
A. Yes, sir.
Q. Did you have any professional relation to him?
A. Why, I was family physician for the family for several years.
Q. Did you see the body of Mr. Adams after his death?
A. I did.
Q. Do you remember about when that was?
A. I don't remember the dates exactly; it was in the fall or early winter.
Q. Within a day or two after his death?
266 A. Yes, sir; just about the time, just soon after his body was brought to the city?
Q. Was that after the undertaker had——
A. (Interrupting.) Yes, after the undertaker had——
Q. (Interrupting.) Just after it was brought to the city?
A. Yes, sir.
Q. Was it the same day that it was brought to the city, do you recall?

A. I think it was the next day.

Q. I am going to assume some facts, and on those facts I will ask you to base your answer. Assuming that there was a three-cornered wound in the chest midway between the spinal column and the left shoulder blade, each side of the wound about three-quarters of an inch long, ragged, in the dead body of a man, and that on the day after the man was alive the dead body was embalmed by injecting an embalming fluid into the brachial artery in the arm and that such embalming fluid flowed out of the body through the wound and back, and also flowed out through the mouth and nose, and that a quantity of blood was found in each pleural cavity prior to the embalming, what condition, in your opinion, would the structures in the chest be in?

A. I should think they would be badly torn.

Q. That would involve vessels and lungs also, would it not?

A. Yes, sir.

Q. What would be the effect of such a condition, Doctor, upon life?

A. I should think it would be very dangerous to life?

Q. Probably fatal or otherwise?

267 A. Probably fatal.

Q. Assuming that a body weighing about two hundred pounds fell or was thrown from a railroad train going at from forty to sixty miles an hour and was thrown for a distance of from fifty or sixty to one hundred and eight feet, a little more or less, and struck the ground substantially covered with rocks of various shapes at one or more places in that distance from thirteen to nineteen feet below the railroad track, and that within that distance the head of the body struck at least once upon the rocks; that there was a scalp wound over the temple containing a piece of the skull which had been cut off and was enclosed in the piece of skin; that there was a scalp wound on the back of the head, hemorrhage from both ears, also from the nose and mouth, what condition of the skull would exist, in your opinion, from these facts?

A. I should think there would be a fracture of the base of the skull if the fracture in the anterior part of the skull was present.

Q. What is the effect, Doctor, of a fracture of the base of the skull?

A. It is usually fatal.

Q. Assuming that a body weighing two hundred or two hundred and twenty pounds was thrown from a railroad train under the circumstances as I have recounted them, Doctor, and lit upon the rocks at a depth below the track of thirteen to nineteen feet, and from sixty to one hundred feet distant, would the force of the throw and the impact of the body account in your opinion for the ruptured condition within the chest-wall?

A. It would.

268 Q. Assuming the body, Doctor, to have been in the condition in which I have described it, and to have passed through the conditions which I have indicated, from those conditions what would you consider the cause of death?

A. Why I should think it was from being thrown from the train and the concussion.

Q. And these various injuries?

A. That produced those various injuries.

Q. Doctor, in your relations with Mr. Adams and his family, what was his condition of health prior to his death, so far as you know?

A. Why, it was very good.

Q. Had he complained to you of any indisposition within recent times prior to his death?

A. He never did.

Cross-examination.

(By Mr. THOMPSON:)

Q. Doctor, you testified on the former trial of this case, did you not?

A. Yes, sir.

Q. And in that testimony you stated that Mr. Adams was a very short, very thick-set man for his height with a very short neck and full fleshed face, did you not?

A. I did.

Q. And that he was a very full-blooded man. You testified to that, did you not, Doctor?

A. Yes.

Q. Mr. Adams was a man about five feet six or five feet six *inches* and a half inches, tall, was he not, Doctor?

A. I should judge so.

269 Q. And weighed something over two hundred pounds, did he not?

A. I should think he weighed in that neighborhood; I never saw him weighed.

Q. His flesh showed very much of his body, didn't it—he was a very round full-formed, short man?

A. Yes, sir.

Q. And he had quite short arms, didn't he?

A. I don't remember about that; whether they were out of proportion or not.

Q. You don't think that it was noticeable?

A. I never noticed that particularly.

Q. Doctor, you said upon the hypothetical question presented you by counsel that you would think such a fall as that, or being thrown from a train would produce that; it would not make any difference so far as the effect was concerned whether the man leaped from the train or was pushed from the train or was thrown from the train, would it, so far as the effect was concerned, if the train was in motion?

A. I don't think it would.

(Excused.)

THOMAS HOOKER, testified as follows:

Direct examination.

(By Mr. C. S. VOORHEES:)

Q. State your name.
A. Thomas Hooker.
Q. Where do you reside?
A. Spokane.
Q. What is your occupation?
A. Manager of the Spokane "Chronicle."

270 Q. What connection did you have with the advertising department of the Spokane "Chronicle" on the 13th of November, 1898, and for sometime prior thereto?
A. General supervision of it.
Q. (Handing witness paper.) I will ask you to examine this copy of the "Chronicle," Mr. Hooker, of the 12th of November, 1897. Examine that part of the "Chronicle" where you find the advertisement of the Northern Pacific Railway Company and state to the jury if that is a copy of the "Chronicle" newspaper which you hold in your hand of the 12th day of November, 1897.
A. Yes, sir.
Q. Now, you may state to the jury by whose authority that advertisement of the Northern Pacific was inserted in the "Chronicle" and carried by the "Chronicle" as an advertisement.
A. The copy was furnished by the local agent.
Q. Local agent of the Northern Pacific?
A. Northern Pacific railroad and inserted at their request.
Q. (Handing witness paper.) I will ask you to examine that paper and state to the jury what it is.
A. Spokane "Chronicle" of September 19, 1898.
Q. I will ask you to examine the advertisement of the Northern Pacific, on page 6 of that paper, and state by whose authority that advertisement was published and carried in the "Chronicle" newspaper.
A. Copy was furnished by the local agent of the Northern Pacific road and inserted at their request.

271 (Plaintiffs' counsel offered the papers just identified by the witness in evidence, and the same were received without objection and marked Plaintiffs' Exhibits "A 1" and "A 2.")
(Mr. C. S. Voorhees read the following extracts from the papers, Plaintiffs' Exhibits "A 1" and "A 2.")

Plaintiffs' Exhibit "A 1."

THE "CHRONICLE," SPOKANE, WASH.,

Friday, November 12, 1897.

NORTHERN PACIFIC.

Yellowstone Park.

THE FAST LINE TO ALL POINTS.

The only line running steam-heated vestibuled trains.
The safest and the best.
All trains equipped with Pullman palace cars.
Elegant dining-cars.

MODERN DAY-COACHES.

TOURIST SLEEPING-CARS.

Through tickets to all points in the United States and Canada.
Steamship tickets to all parts of the world. Tickets to Japan and China, via Tacoma and Northern Pacific Steamship Company.

No. 1 west departs..... 8:25 p. m.
No. 2 east departs..... 7:00 a. m.

272 For information, time cards, maps and tickets, apply to
F. D. GIBBS,
General Agent, Spokane, Wash.

A. D. CHARLTON, *A. G. P. A.*,
255 *Morrison St., Cor. 3d, Portland, Oregon.*

Plaintiffs' Exhibit "A 2" (2d Trial).

THE "CHRONICLE," SPOKANE, WASH.,

Monday, September 19, 1898.

NORTHERN PACIFIC.

Yellowstone Park.

THE FAST LINE TO ALL POINTS.

THE DINING-CAR ROUTE VIA

THE YELLOWSTONE PARK.

The safest and best. Solid vestibule trains, equipped with Pullman palace cars.

ELEGANT DINING CARS.

MODERN DAY COACHES.

TOURIST SLEEPING CARS.

Through tickets to all points in the United States and Canada.
Steamship tickets to all parts of the world.
Tickets to China and Japan, via Tacoma and Northern Pacific Steamship Company.

273 Trains depart from Spokane:

Maine line.

No. 1, west, at..... 3:40 p. m.
No. 2, east, at..... 7:30 a. m.

Branch line.

Palouse & Lewiston, at..... 8:00 a. m.
°Central Washington, at..... 8:30 a. m.
Spokane and Idaho, at..... 8:00 a. m.

°Daily except Sunday. All others daily.

For rates and other information call on or address

F. D. GIBBS,
General Agent, Spokane, Wash., City Ticket Office, Corner Howard St. and Riverside Ave.

A. D. CHARLTON, *A. G. P. A.*,
No. 255 Morrison St., Cor. 3d, Portland, Ore.

F. T. POST, testified as follows:

Direct examination.

(By Mr. C. S. VOORHEES:)

Q. Please state your name to the jury.
A. F. T. Post.
Q. Where do you reside?
A. Spokane.
Q. What is your profession?
A. Attorney at law.
Q. How long have you resided here, Mr. Post?
A. 11 years.

274 Mr. C. S. VOORHEES: I don't know, if your honor please, if I entirely understand the limitation your honor placed upon me, and whether I may ask this witness the question that I asked Judge Richardson as to Mr. Adams' character and standing?

The COURT: Yes, I agreed to allow you to call two, in addition to such testimony as you might elicit from Mr. Allen and Mr. Pierce.

Mr. C. S. VOORHEES: I had in mind Judge Prather, who will be here presently, and whether your honor would allow me to ask the same question of this witness in addition to Judge Prather, whom I am expecting every minute.

The COURT: Is this witness a witness to anything else except his professional standing?

Mr. C. S. VOORHEES: Yes, sir.

The COURT: I will allow him to inquire of him about the same matter, then.

Q. I will ask you if you were acquainted with Jay H. Adams in his lifetime.

A. I was.

Q. Practiced law with him before the courts here in Spokane?

A. Yes, sir.

Q. And of the State?

A. Yes, sir.

Q. Were you acquainted with his character, standing and capacity as a member of the Spokane bar and bar of the State of Washington prior to the 13th of November, 1898, the day of his death?

A. I think I was.

Q. Please state to the jury what that was.

A. He stood very high at the bar in this city.

275 Q. Mr. Post, prior to the 13th day of November, 1898, what, if any, occasion did you have to travel over the Northern Pacific railroad?

A. I have traveled over it a good many times, that is from St. Paul to Spokane and from Spokane to the Sound.

Q. What was the practice of the Northern Pacific Railroad Company as to attaching a dining-car for the convenience of the traveling public on its through train?

A. According to my best recollection, it always had a dining-car, that is for the last ten years.

Q. What was the practice within your observation as to the permission afforded the traveling public to pass to and from that dining-car at times other than when meals were being served therein?

A. According to my observation and experience, the traveling public had a right to go into the dining-car at all times during the day and in the evening after dinner up to some hour, I don't know what, 9 or 10 o'clock.

Q. Within your experience did the traveling public exercise that right?

A. They did.

Q. What is the fact as to whether you ever exercised it yourself, Mr. Post?

A. I have many times.

Q. At times other than when the train was in motion or standing still?

A. I have exercised it when the train was in motion. I don't remember of ever having gone in when the train was standing still.

Q. And at times other than when meals were being served?

A. Yes, sir; many times.

276 Q. What was the practice within your observation, Mr. Post, of inviting the traveling public when meals were ready for serving in the dining-car?

A. Somebody from the dining-car usually came into the other cars and announced that "breakfast was now ready in the dining-car," or dinner or lunch, as the case might be, the first, second and third calls. I guess we all remember about that.

Q. When was that call made Mr. Post, with reference to the train being stationary or in motion?

A. Made at any time; it didn't make any difference whether the train was in motion or stationary.

Cross-examination.

(By Mr. THOMPSON:)

Q. Did you hear them announce that "cigars were now ready in the dining car"?

A. No, I never heard that announced.

Q. Merely an announcement for meals?

A. Yes, sir.

Q. The traveling public did generally, whenever they saw fit, go to and from the dining-car from all the cars?

A. I think so.

Q. As far as your observation was concerned?

A. According to my observation; yes, sir.

Q. And that is usual and customary as far as your observation is concerned, upon all of our railroads, is it not, Mr. Post, where they have dining-cars?

A. Yes, sir.

(Excused.)

277 ALONZO M. MURPHY, testified as follows:

Direct examination.

(By Mr. C. S. VOORHEES:)

Q. What is your name?

A. Alonzo M. Murphy.

Q. Where do you reside?

A. Spokane.

Q. How long have you resided in Spokane?

A. Twelve years.

Q. What was your business, Mr. Murphy, at and prior to the 13th day of November, 1898?

A. Part of my business was publishing a newspaper in Spokane.

Q. Called the "Outburst"?

A. Yes, sir.

Q. At and prior to the 13th of November, 1898, what, if any, occasion did you have to travel over the line of the Northern Pacific railroad in its through trains?

A. I traveled a great many times on the trains.

Q. What was the practice, habitual practice, of the railroad company as to the presence in those trains of a dining-car?

A. They usually had a dining-car on the through trains.

Q. What was the practice of the traveling public within your observation in passing to and from this dining-car from any portion of the train while in motion?

A. I think the dining-car was open at all hours, so that you could pass from the front to the rear of the train at any time.

Q. At any time?

A. At any time, yes, sir.

278 Q. And what is the fact as to your having exercised at any time such a right?

A. At all hours of the day and night, passed through.

Q. And what was the fact as to whether or not, when you exercised that right the train was stationary or in motion?

A. Both.

Q. Both?

A. Both stationary and in motion.

Mr. C. S. VOORHEES: I believe that is all I want to ask Mr. Murphy at this time. I will want to recall him in a moment.

Mr. THOMPSON: Do you want to identify the paper?

Mr. C. S. VOORHEES: Yes, but I have not got the paper.

Mr. THOMPSON: We are willing to concede that he will identify it.

Mr. C. S. VOORHEES: The paper of the 5th of November. We have it; it was lost through accident in the last trial.

Mr. THOMPSON: Whatever paper you have of the "Outburst" we will consider that he will identify it.

Mr. C. S. VOORHEES: Very well.

(Excused.)

(Without cross-examination.)

E. H. HUTCHINSON, testified as follows:

Direct examination.

(By Mr. C. S. VOORHEES:)

Q. What is your name?

279 A. E. H. Hutchinson.

Q. Where do you reside?

A. Spokane.

Q. Where were you residing at and prior to the 13th of November, 1898?

A. Spokane.

Q. What position did you occupy, what business were you in, at and prior to the 13th of November, 1898?

A. Advertising agent of the "Review."

Q. (Handing witness paper.) I will ask you to look at that paper and state what it is?

A. Review of November 12th, 1897.

Q. Now, I will ask you to look at the advertisement on page 8 of that and state to the jury by whose authority that advertisement was inserted in that paper.

A. We inserted it under the instructions of the local agent here, F. D. Gibbs.

Q. (Handing witness paper.) You may state to the jury what that paper is?

A. September 19th, 1898.
Q. "Spokesman-Review?"
A. "Spokesman-Review."
Q. And on the last page of that paper, I will ask you to look at that advertisement and state to the jury by whose authority that advertisement was inserted in that paper?
A. That was also furnished by the local agent of the Northern Pacific railroad.

(Excused.)

(The papers just identified by the witness are offered in evidence by plaintiffs, received without objection, and marked Plaintiffs' Exhibits "A 3" and "A 4.")

280 (It is stipulated and agreed by and between counsel that the paper offered in evidence known as the "Outburst," dated November 5, 1898, is a correct copy of the paper of that date. The same is offered in evidence by plaintiff, received without objection, and marked Plaintiffs' Exhibit "A 5." Plaintiffs' Exhibits "A 3," "A 4," and "A 5" were read in evidence by plaintiffs' counsel, as follows:)

Plaintiffs' Exhibit "A 3."

THE "SPOKESMAN-REVIEW,"

Friday, November 12, 1897.

NORTHERN PACIFIC.

Yellowstone Park.

THE FAST LINE TO ALL POINTS.

The only line running steam-heated vestibuled trains.
The safest and best.
All trains equipped with Pullman palace cars, elegant dining-cars, modern day-coaches. Tourist sleeping-cars.
Through tickets to all points in the United States and Canada. Steamship tickets to all parts of the world.
Tickets to Japan and China, via Tacoma and Northern Pacific Steamship Company.

No. 1 departs.....8:25 p. m.
No. 2 departs.....7:00 a. m.

281 For information, time cards, maps and tickets apply to

F. D. GIBBS,
General Agent, Spokane, Wash.

A. D. CHARLTON,
A. G. P. A., 255 *Morrison St., Cor. Third,*
Portland, Ore.

Plaintiffs' Exhibit "A 4."

THE "SPOKESMAN-REVIEW," SPOKANE, WASH.,

Monday Morning, September 19, 1898.

NORTHERN PACIFIC.

Yellowstone Park.

THE FAST LINE TO ALL POINTS.

THE DINING-CAR ROUTE.

VIA YELLOWSTONE PARK.

The safest and best. Solid vestibule trains equipped with Pullman palace cars, elegant dining-cars, modern day-coaches, tourist sleeping cars.

Through tickets to all points in the United States and Canada.

Steamship tickets to all parts of the world.

Tickets to China and Japan via Tacoma and Northern Pacific Steamship Co.

Trains depart from Spokane.

Main Line.

No. 1, west, at	3:40 p. m.
No. 2, east, at	7:30 a. m.

282 Branch Lines

Palouse and Lewiston, at	8:00 p. m.
°Central Washington, at	8:30 a. m.
Spokane and Idaho, at	8:00 a. m.

°Daily except Sunday. All others daily.

For rates and all other information call on or address

F. D. GIBBS,
General Agent.

City ticket office, corner Howard street and Riverside avenue, Spokane, Wash.

A. D. CHARLTON,
A. G. P. A., No. 255 Morrison Street, Corner Third, Portland, Ore.

283 **Plaintiffs' Exhibit "A 5."**

THE "OUTBURST," SPOKANE, WASHINGTON,

Saturday, Nov. 5, 1898.

NORTHERN PACIFIC.

Yellowstone Park Line.

THE FAST LINE.

To all points.

THE DINING-CAR ROUTE.

Via Yellowstone Park.

SAFEST AND BEST.

Solid Vestibule Trains equipped with

PULLMAN PALACE CARS,

ELEGANT DINING-CARS,

MODERN DAY-COACHES,

TOURIST SLEEPING-CARS.

Through tickets to all points in the United States and Canada. Steamship tickets to all parts of the world. Tickets to China and Japan, via Tacoma and Northern Pacific Steamship Company.

Trains depart from Spokane.

No. 1 west, at.....3:40 p. m. daily
No. 2 east, at.....7:30 daily

284 For information, time cards, maps and tickets apply to agents.

F. D. GIBBS,
General Agent, Spokane, Wash.

A. D. CHARLTON,
General Passenger Agent,
255 *Morrison St., Cor. 3d, Portland, Ore.*

D. C. CORBIN testified as follows:

Direct examination.

(By C. S. VOORHEES:)

Q. Please state your name to the jury.
A. D. C. Corbin.
Q. You reside in Spokane?
A. I do.

Q. What is your occupation now, Mr. Corbin?
A. Well, I don't know, I am in various things.
Q. What?
A. Various things; one thing, a sugar factory down here.
Q. What was your business at and prior to the 13th of November, 1898?
A. I was connected then with the Spokane Falls & Northern, to the fall of 1898.
Q. In what position were you connected with that road?
A. President of the road.
Q. President of the road?
A. Yes.
Q. Prior to the 13th of November, 1898, did you know Mr. Jay H. Adams?
A. I did.
Q. Deceased on the 13th of November, 1898?
A. I think so.
285 Q. Did Mr. Adams have any professional connection with you prior to the 13th of November, 1898? If so, what was it?
A. He was attorney for the companies that I represented, and my personal attorney.
Q. State whether or not there was a stated, fixed compensation for the services rendered by Mr. Adams to your company.
A. There was.
Q. How much was it?
A. Fifteen hundred dollars a year.
Q. How long was that paid to Mr. Adams? From the 13th of November, 1897, to the 13th of November, 1898, during that year?
A. Why up to—I won't be certain to a month; I think it was September or probably the first of September.
Q. Up to the first of September?
A. I think so. That is when I left the road.
Q. From your professional connection with Mr. Adams, were you acquainted with his standing, character and capacity as a lawyer, and a member of the Spokane bar?
A. I think I was.
Q. State to the jury what that was.
A. I think it was first rate.

DECEMBER 1, 1900—1:30 o'clock p. m.

WILLIAM E. RICHARDSON testified as follows:

Direct examination.

(By Mr. C. S. VOORHEES:)

Q. Please state your full name to the jury.
A. My name is William E. Richardson.
286 Q. What position do you now occupy?
A. I am judge of the superior court of Spokane county, and of Stevens county.

Q. How long have you been superior judge of the counties of Spokane and Stevens?

A. Since January, 1897.

Q. Were you acquainted with Jay H. Adams, a member of the Spokane bar, during his lifetime?

A. I was.

Q. Were you acquainted with him as a practitioner in your court?

A. I was.

Q. Were you acquainted with his character, standing and capacity as a lawyer at the Spokane bar and the bar of the courts of the State of Washington?

A. Yes, sir.

Q. Please tell the jury what that was.

A. The standing and reputation of Mr. Adams as a lawyer at the bar was good. I consider that he stood in the front rank of the profession. So far as I was able to judge.

L. H. PRATHER testified as follows:

Direct examination.

(By Mr. C. S. VOORHEES:)

Q. Please state your name to the jury, Judge.

A. L. H. Prather.

Q. Where do you reside?

A. In the city of Spokane, Washington.

Q. What is your present official position, if any?

287 A. Judge of the superior court of the State of Washington.

Q. And for Spokane county?

A. And for Spokane county.

Q. How long have you occupied that position?

A. About four years.

Q. Prior to the 13th of November, 1898, were you acquainted with Jay H. Adams, a member of the Spokane bar?

A. Yes, sir.

Q. You had known him as a practicing attorney yourself and as judge of the superior court?

A. Yes, sir.

Q. For how long?

A. Well, for some seven or eight years, possibly nine.

Q. Were you acquainted, Judge Prather, with his character, standing and capacity as a member of the Spokane bar and of the bar of the courts of the State of Washington?

A. I think so.

Q. Please state to the jury what that was.

A. Well, it was good. He was among the leading members of the bar.

(Excused.)

(Without cross-examination.)

AUSTIN CORBIN, II, testified as follows;

Direct examination.

(By Mr. C. S. VOORHEES:)

Q. State your full name to the jury.
A. Austin Corbin, II.
Q. Where do you reside?
A. Spokane.
288 Q. How long have you resided in Spokane, Mr. Corbin?
A. Ten or twelve years.
Q. What business were you in prior to the 13th of November, 1898?
A. Railroad business.
Q. And other business?
A. Yes, other business.
Q. Mining?
A. Yes.
Q. Were you acquainted with Jay H. Adams in his lifetime prior to the 13th day of November, 1898?
A. I was.
Q. What occasion, if any, did you ever have to invoke the aid of Mr. Adams' professional services, his services as a lawyer?
A. We employed him in our different businesses.
Q. You employed him in your different businesses?
A. Yes, sir.
Q. Was he employed in your railroad businesses?
A. Yes, sir.
Q. What railroad were you engaged with at that time, interested in?
A. Spokane & Northern.
Q. Spokane & Northern. And what position did you occupy?
A. Various positions.
Q. You were the secretary?
A. No; cashier, treasurer—something of that kind.
Q. How long was Mr. Adams employed by the Spokane Falls & Northern?
A. I can't remember, several years.
Q. Do you know what compensation the Spokane Falls & Northern accorded him in connection with that employment?
A. I could not tell you now.
Q. You don't know?
289 A. No; not well enough to testify.
Q. Did you have occasion to employ Mr. Adams in any other of your business affairs?
A. Yes, sir.
Q. In what connection?
A. Mining, giving advice.
Q. Were you connected at that time with the Iron Mask Mining Company?
A. Yes, War Eagle and Iron Mask.

Q. Do you remember what, if any, compensation the Iron Mask Company paid for services rendered by Mr. Adams to that company during the last year of his life, from November 13th, 1897, to November 13th 1898?

A. Yes, there was a thousand dollars payment made; whether it comes within that time I don't remember exactly.

Q. It would be within that period or within a period of two years prior to his death?

A. Yes, I would say it was. I could tell if I had an opportunity to look up the receipts; I could tell exactly.

Q. Do you know what other compensation—I am speaking now of compensation paid to his personal representative—was paid after his death for services rendered in the last year of his life?

A. There was a payment made of $300; I think, in the latter part of October or November; I will not be sure; somewhere about that period, in 1897.

Q. That was paid to Mr. Adams?

A. That was paid to Mr. Adams. Then I believe there was about $250 or $300 paid after Mr. Adams' death to his estate.

290 Q. That was $250, was it not?

A. I think that was it, it was either $250 or $300; I know it was one of those amounts.

Q. I will ask you, Mr. Corbin, if you were during the period of your acquaintance with Mr. Adams acquainted with his character, standing and capacity at the bar as a lawyer?

A. Yes, I was.

Q. Tell the jury what that was.

A. Very good.

Q. I will ask you, Mr. Corbin, if you, prior to the 13th of November, 1898, had occasion at any time to travel over the Northern Pacific on its through trains between the East and the West or between Spokane and the coast?

Mr. THOMPSON: If your honor please, I don't think that it is proper for counsel to duplicate and quadruplicate testimony on that point, as there never has been any contention as to whether or not there was a dining-car and whether or not people went through other cars to go in.

Mr. C. S. VOORHEES: If that is the fact, if your honor please, I have nothing further to say.

The COURT: Yes, sir.

Mr. C. S. VOORHEES: The answer denies this.

Mr. THOMPSON: Denies the question of negligence, but it does not deny that people did go in there.

Mr. C. S. VOORHEES: Denies that the traveling public were entitled to pass and repass at their will while the train was in motion.

291 The COURT: Still, it is not a point on which the defense intend to meet you with contradictory evidence. You have enough evidence on that point.

Mr. C. S. VOORHEES: I withdrew the question.

(Excused.)
(Without cross-examination.)

S. S. GLIDDEN, testified as follows:

Direct examination.

(By Mr. C. S. VOORHEES:)

Q. Please state your name to the jury, Mr. Glidden.
A. S. S. Glidden.
Q. You reside in Spokane?
A. Yes, sir.
Q. How long have you resided in Spokane?
A. About fourteen or fifteen years.
Q. What is your business now?
A. I am president of the Old national bank.
Q. What position did you occupy in connection with the Old national bank, if any, at and prior to the 13th day of November, 1898?
A. I was the same.
Q. You were the president?
A. Yes; sir; have been ever since the bank was organized.
Q. At and prior to the 13th of November, 1898, were you acquainted with Jay H. Adams?
A. Yes, sir.
Q. What professional connection, if any, did Jay H. Adams sustain to the Old national bank?
A. He was the attorney for the bank.
292 Q. Attorney for the bank?
A. Yes, sir.
Q. What annual retainer, if any, did the bank pay Mr. Adams for that service?
A. Three hundred dollars a year.
Q. And that three hundred dollars a year covered what character of service?
A. Just for advice.
Q. Can you state to the jury, Mr. Glidden, how much outside, aside from the three hundred dollars annual retainer paid by your bank to Mr. Adams for legal services during the year beginning the 13th of November, 1897, and ending on the 13th of November, 1898?
A. Yes; I have a memorandum of it. (Referring to memoranda.) In 1897 we paid him $500; and in 1898 we paid him $250 at one time and $275 at another, and $100 at another time; $300 at another time; $150 at another time; and $1,850.
Q. You were acquainted with the standing, character and capacity of Mr. Adams as a member of the bar, were you?
A. Yes, sir.
Q. What was that, Mr. Glidden?

A. I think he had a very good standing; was a very careful lawyer.

Q. How was this prepared, from what data; from what data was this statement prepared?

A. From the books of the bank.

Mr. C. S. VOORHEES: We offer that statement in evidence.

Mr. THOMPSON: We object as incompetent. He testified to what he actually paid so it is immaterial what he put on paper.

293 (Objection sustained. Plaintiffs allowed an exception.)

(Excused.)

(Without cross-examination.)

ARTHUR J. SHAW, testified as follows:

Direct examination.

(By Mr. C. S. VOORHEES:)

Q. State your full name to the jury.

A. Arthur J. Shaw.

Q. Where do you reside?

A. Spokane.

Q. How long have you resided in Spokane?

A. Fourteen years.

Q. Were you acquainted with Jay H. Adams in his lifetime prior to the 13th day of November, 1898?

A. Yes, sir.

Q. Did you ever have any business dealings with Jay H. Adams in a professional way?

A. Yes, sir.

Q. Prior to November, 1898; when were these business dealings, with reference to the last year of his life, Mr. Shaw?

A. It was during the last year of his life, just about a year.

Q. You may state to the jury what those business dealings were? What position did you occupy at that time?

A. I was receiver of the First national bank.

Q. First national bank in liquidation?

A. Yes, sir.

Q. Now, you may tell the jury what professional connec-

294 tion, if any, you had, with Mr. Adams du-ing the last year of his life?

A. He was acting as attorney for the trust.

Q. I will ask you to state to the jury what, if anything, was paid to him or to his personal representative after his death as compensation for the services so rendered by him during the last year of his life?

A. I paid his administrator $1,000 for his services that year.

Q. What, if anything, had been paid to Mr. Adams prior to his death as compensation for services rendered the trusts?

A. Two hundred and fifty dollars.

Cross-examination.

(By Mr. THOMPSON:)

Q. Did that have anything to do with the $1,850 that Mr. Glidden was testifying about?
A. No.
Q. It was not that national bank?
A. I don't know anything about what Mr. Glidden testified to.
Q. It was not the Old national bank?
A. Oh, no; this was the First national bank.
Q. The First national bank. I simply got it national bank. You paid that to the administrator after Mr. Adams' death?
A. Yes, sir.
Q. No part of the $1,000 was paid to him during his lifetime?
A. No, sir.

(Excused.)

295 EDWARD J. ROBERTS, sworn on behalf of plaintiffs, testified as follows:

Direct examination.

(By Mr. C. S. VOORHEES:)

Q. State your full name to the jury.
A. Edward J. Roberts.
Q. Where do you reside?
A. Spokane.
Q. Were you residing at Spokane on and prior to the 13th of November, 1898?
A. Yes, sir.
Q. Were you acquainted with Jay H. Adams, deceased?
A. Yes, sir.
Q. During Mr. Adams' lifetime did you ever have occasion to invoke his professional aid in any of your business matters?
A. Yes, sir.
Q. Do you recall what, if any, business Mr. Adams did with you during the last year of his life, for which you paid him any compensation?
A. He had a case for me during the last year of his life.
Q. How much did you pay him for that service?
A. I don't recall now what it was.
Q. You paid him something, didn't you?
A. Yes, sir.
Q. You don't recall how much?
A. No; it was a retainer; it was a retaining fee, but I don't remember what it was.
Q. Can you ascertain what amount that was, Mr. Roberts?
A. I think so; yes, sir.

296 Mr. C. S. VOORHEES: If your honor please, we have got about to the resting point. I shall ask your honor to allow me to recall Mr. Roberts.

Mr. THOMPSON: Did Mr. Roberts testify in the case before?

The COURT: Yes, sir.

Mr. C. S. VOORHEES: He was not asked this question. I don't find it here in the testimony. I have his testimony here before me. He testified that Mr. Adams had been employed, and that was all.

The WITNESS: If I recollect right it was $50 retaining fee, but I am not certain how much, it was retaining fee in a damage suit case.

Q. That was the last year of his life?

A. Yes, sir.

(Excused.)

A. W. DOLAND, testified as follows:

Direct examination.

(By Mr. C. S. VOORHEES:)

Q. Please state your name to the jury, Mr. Doland.

A. A. W. Doland.

Q. Where do you reside?

A. Spokane.

Q. How long have you resided in Spokane?

A. Nearly nine years.

Q. At and prior to the 13th day of November, 1898, what was your business, Mr. Doland?

A. Wholesale drug business.

297 Q. The Spokane Drug Company?

A. The Spokane Drug Company; yes, sir.

Q. Prior to the 13th day of November, 1898, were you acquainted with Jay H. Adams?

A. I was.

Q. What position at that time when you knew Mr. Adams did you occupy in connection with the Spokane Drug Company?

A. I was secretary and manager of the Spokane Drug Company.

Q. How long had you known Mr. Adams, did you say?

A. I got acquainted with Mr. Adams in March, 1892.

Q. In March, 1892?

A. Yes, sir.

Q. And you knew him from that time until the date of his death?

A. I did; yes, sir.

Q. I will ask you to state to the jury, Mr. Doland, whether or not during your acquaintance with Mr. Adams, you ever had occasion to invoke his professional aid in any of your business matters?

A. Yes, sir; for five years he was the attorney for the Spokane Drug Company, and after that I had him for my personal attorney for nearly three years.

Q. During the last year of his life, from the 13th of November, 1897, to the 13th of November, 1898, what employment did you have with Mr. Adams?

A. I had Mr. Adams on some personal matters of my own.

Q. Do you remember what you paid him during that year for those professional services?

A. Yes, sir; I paid him $275.

298 Q. Were you acquainted with Mr. Adams' character, standing and capacity at the bar as a practicing lawyer?

A. Why, yes, sir.

Q. What was it?

A. It was good.

(Excused.)

(Without cross-examination.)

And then came the defendant, and on its behalf introduced the following testimony:

C. SIMENSEN, testified as follows:

Direct examination.

(By Mr. THOMPSON:)

Q. State your name.

A. C. Simonsen.

Q. What is your occupation?

A. Supervisor of the Seattle & International railway.

Q. What has been your occupation generally?

A. On the Idaho division it was resident engineer.

Q. Idaho division of what road?

A. Of the Northern Pacific.

Q. How long were you such resident engineer?

A. About ten years.

Q. From what time to what time did that ten years extend?

A. About 1890 to 1900.

Q. I will ask you if, as such engineer, you became familiar with the railway line from Hope, Idaho, to Spokane?

A. Yes, sir.

Q. How often did you during that time pass over the portion from Hope, Idaho, west for twelve or fifteen miles?

A. Several times every month.

299 Q. I will ask you to step to the map which is exhibited on yonder board. State to the jury who made that map?

A. I made the map.

Q. When did you make it?

A. The last trial.

Q. Do you remember the former trial of this cause?

A. Yes, sir.

Q. State whether it was made at that time, or before or after.

A. It was before that time, just prior to the trial.

Q. State whether this is the same map used on that trial.

A. It is the same map.

Q. State to the jury what the fact is as to whether that map is a correct or incorrect map of the line of road represented by it.

A. It is a correct map as the road runs to-day.

Q. What part of the Northern Pacific Railway line is exhibited on that map?

A. From Hope to Sandpoint.

Q. From Hope to Sandpoint in what State?

A. Hope, Idaho, to Sandpoint.

Q. What distance does that represent?

A. A little over sixteen miles.

Q. I will ask you to state at what portion of the map the town or station of Hope, Idaho, is located?

A. At the mile post.

Q. Exhibit to the jury on the map at what point. What indication have you placed there to indicate the town of Hope?

A. I have written "Hope."

300 Q. From the place where you have written "Hope" state to the jury which is the westerly direction represented on that map.

A. Towards the wall.

Q. I will call your attention to a portion of that map in which the line instead of being a black line is a red line. What does that indicate?

A. It indicates bridge No. 2, or, as it is generally called, Pack River bridge.

Q. What length is that bridge?

A. About 7,100 feet.

Q. What kind of a bridge is that that you have intended to represent on that map?

A. The whole bridge No. 2.

Q. After passing bridge No. 2—which is represented in red—I will ask you to state to the jury what curves, if any, you have represented there, and the degree of them, beginning at the first one and continuing in a westerly direction?

A. The first one is a 4 degree curve; then a 6 degree curve; a 2.15 curve; a 5.45 curve; a 6 degree curve; a 2.30 curve; a 5.25 degree curve; a 1.05 curve; a 6 degree curve; a 6 degree curve; a 2 degree curve; a 5.30 degree curve; a 6. curve; a 6 degree curve; a 1.45 degree curve; 6 degree curve; a 5 degree curve.

Q. I notice upon the map and call your attention to the fact that there is a break in the black line that you have indicated there. What does that represent and why does it exist on your map?

A. Because it did not get through on the paper. In order to get this to join here, I had to take the paper off and take it down in this way.

301 Q. What is the fact as to whether the point which I now mark "X" and the point which I now mark "X1" are the same points or different points?

A. They are the same points.

Q. Now, continuing westerly from the point that I have marked "X1" on the map, how far is there a straight line, if any distance?

A. It is about a straight line for a mile.

Q. At the end of that mile what is the degree of curvature, if any?

A. 6 degree; then comes *a* 3, *a* 4, *a* 4, *a* 4, and we have about two miles of a tangent—straight line—and then we have 2.30 degree curve, and about another mile of straight line, and a 2 degree curve, and about one quarter of a mile a straight line, and 2 degree again until we get to Sandpoint.

Q. What do the large figures which you have placed at different places westerly from Hope, enclosed in several rings, marked "1," "2," "3," and "4," etc., continuously to "16" represent?

A. Mile posts.

Q. Mile posts or miles westerly from Hope?

A. Miles west from Hope.

Q. At what point is the station Sandpoint with reference to the 16 mile post that you have marked?

A. Just at mile post 16.

Q. I will ask you to state what the fact is as to whether the bridge—which is represented in red—is on a gradient or on a level line, level track?

A. It is on a level track, level grade.

302 Q. What is intended to be represented by the words "Pack river" placed there?

A. It means the station of Pack river; there is a siding there.

Q. Is that or is it not at the crossing of the river or is it beyond?

A. It is beyond the river, beyond Pack river.

Q. When you state beyond, do you mean on the side next to Spokane or away from Spokane?

A. The side next to Spokane.

Q. And how far away from the river?

A. It is about a half a mile; of course it is right in the lake there.

Q. On this map I see that you have indicated in many places triangles or triangular spaces enclosed between two lines and a mark between them; as in the first one-quarter, with a small mark to the right of it; does that indicate the degree of curve?

A. It indicates the length of the curve.

Q. It indicates the length of the curve?

A. The space between the two lines?

Q. What does the "4" note for instance indicate?

A. That indicates the sharpness of the curve, the degree of the curve.

Q. And 3.30?

A. That the curve is 3.30.

Q. And that is so, is it, between all of these triangular points that you have named?

A. Yes, sir.

Q. What does the continuous black line and red line throughout its length indicate?

303 A. The railroad track of the Northern Pacific railway from Hope to Sandpoint.

Q. What does the word "Kootenai" placed above the railway line indicate?

A. It means Kootenai station.

Q. And the word "Oden"?

A. Oden station.

Q. What do the words "Point of accident" indicate on here?

A. The place which was pointed out to me where Mr. Adams was supposed to have fallen off or was thrown off the train.

Q. Of that you have no knowledge yourself?

A. No, sir.

Q. You simply put that at the point where it has been pointed out to you?

A. Yes, sir.

Q. You don't know whether that is the same point or not, I understand?

A. No, sir.

Q. Upon what degree of curve is that point located?

A. A 6 degree curve.

Q. And which would it be, a right or left curve in coming from Hope to Spokane?

A. It would be a right curve, curve to the right.

Q. I don't remember whether we examined you on that point: Do you know the character of the grade at all those different places, whether in the level or up-grade or down-grade?

304 A. From Hope to Oden it is practically level, from Oden about two miles west it is about a 1 per cent. grade, that means pretty nearly fifty-three feet in a mile going up.

Q. You say "going up"—going from Oden which way?

A. From Oden to Kootenai, about two miles up, and then the balance from that point to Kootenai it is down again about one per cent. grade; from Kootenai to Sandpoint it is very slight descending.

Q. Now, in order that I may not mistake, from Hope to Oden it is——

A. (Interrupting.) It is practically level.

Q. From Oden to what point now?

A. About two miles west, a 1 per cent. grade.

Q. Up-grade?

A. Yes, sir. From that point to Kootenai, it is about a mile, and it is down grade.

Q. From Kootenai to Sandpoint?

A. It is slightly descending.

Mr. THOMPSON: I think, unless I have forgotten some question, that that covers all of the points on the map.

Cross-examination.

(By Mr. VOORHEES:)

Q. Mr. Simonsen, at Pack river, at the west end of the trestle there is a station-house, is there not?

A. Yes, sir.

Q. Right up within a very few feet of the track?
A. Yes, sir.
Q. About how far from the track?
A. About twenty-five feet.
Q. About twenty-five feet from the main track?
A. Yes, sir.
Q. That is a station-house?
A. Yes, sir; a station-house, as we call it.
Q. And you know that that was occupied—it is occupied now?
A. Yes, sir; it was when I was there.
Q. It was occupied on the 13th of November, 1898?
A. Yes, sir.

Redirect-examination:

Q. Was that a section-house or a railway station?
A. A section-house.
Q. What do you mean by section-house?
A. Where the section men and section foreman lives and a bridge tender.

Recross-examination:

Q. I understand you to say that from Oden to a point two miles west from Oden there is a slight grade?
A. Yes, sir.
Q. This one per cent. grade?
A. Yes, sir.
Q. For two miles?
A. For about two miles.

Re-redirect examination:

Q. I will ask you to state what is the occasion or necessity for these curves, whether that is a level country or broken country or not?
A. It is winding around bluffs. It is rocky hillside, and you could not get a straight cut to get through the mountains, so we have to have it winding around.
Q. Were you the locating engineer?
A. No, sir.
Q. The road was built before you come on the road as resident engineer?
A. Yes, sir.
Q. Were you out over this piece of track about the time that Mr Adams came to his death?
A. No, sir.

Re-recross examination:

Q. Mr. Simonsen, so that we may understand it, do I understand you to tell the jury that that point and this point (illustrating on map), are the same point?

A. Yes, sir.

Q. And this map shows the entire road?

A. From Hope to Sandpoint.

Q. Now, will you explain why it was that you made that break? Why couldn't you draw them together?

A. If we should have brought them together this would go away up here, and then we would not have any room on the paper; we would have had so much paper here, then I could put it right along, but on account of that being short I could not.

Q. Then if you had done that, these two points would have come together?

A. Yes, sir; and would have come up in this direction, upward.

Q. Then, in other words, this portion of the road, if the road was shown in a connected way, this portion of the road would be away up here; is that the idea?

A. Yes, sir.

307 Q. Now, with reference to this point where is the lake? Just indicate the lake.

A. The lake goes all the way through here inside of from twenty-five to two hundred or three hundred feet from the center of the track.

Q. Will you indicate the line of the lake shore with reference to this point?

A. In high water, it is clear up to the track.

Q. I am talking now about low water.

A. In the common stage of water it must be about seven or eight feet from the track.

Q. Where on this map?

A. It would be right here (illustrating on map).

Q. Right in here (illustrating)?

A. Right here.

Q. And that lake shore comes around like this (illustrating on map)?

A. Yes, sir; and it goes along here again, and like that (illustrating).

Q. The road follows the line of the lake shore all the way from Hope to Sandpoint.

A. From Hope to Sandpoint; yes, sir.

Q. Then, as I understand you, if you had drawn the lake line you would have drawn it around something like that (illustrating on map)?

A. Yes, sir.

By Mr. THOMPSON:

Q. Now, I will ask you generally. You stated once with reference to the correctness of the map. I will ask you what the fact is as to whether each and every one of these curves and each
308 and every one of these tangents, and all of the portion of the railway line drawn on here is or is not correctly put upon the paper?

A. In 1894 we had a washout, and mostly all of the road was

gone, and I retraced the line again and found out that it was the same.

Q. Then I will ask you to state to the jury what the fact is, whether this correctly indicates the line at the time of the accident (referring to map).

A. It does.

(Excused.)

D. H. MATHESON, testified as follows:

Direct examination.

(By Mr. THOMPSON:)

Q. State your name to the jury.

A. D. H. Matheson.

Q. What is your age?

A. Thirty-nine.

Q. What is your occupation?

A. Locomotive engineer.

Q. How long have you been such locomotive engineer?

A. Seventeen years.

Q. What was your occupation before becoming a locomotive engineer?

A. Well, when starting in I started in as railway brakeman.

Q. How long did you pursue that?

A. About six months.

Q. What was your next business in the railway service?

A. Locomotive fireman.

309 Q. How long did you serve as fireman?

A. About three years and a half.

Q. After you served as fireman, what was your next business in the railway service?

A. Freight engineer.

Q. How long did you serve in that capacity?

A. About nine years.

Q. After being freight engineer, what was the next step in your progress?

A. Passenger engineer.

Q. How long have you served as that?

A. Seven years.

Q. On what different roads have you had this service?

A. My three and a half years firing and six month- of braking was on the Canadian Pacific, and I came from running locomotive on the Canadian Pacific and have been sixteen years on the Idaho division of the Northern Pacific.

Q. What constitutes the Idaho division of the Northern Pacific?

A. The main line from Ellensberg to Hope, including all branches.

Q. How long have you served as passenger locomotive engineer on the Idaho division, and especially over that portion of it between Hope, Idaho, and Spokane, Washington?

A. Seven years in all.
Q. How much over the division from Hope to Spokane?
A. About one-half of the time.
Q. About three years and a half?
A. Just about.

310 Q. State to the jury what the fact is as to how often you made trips over that line during that three years and a half.

A. I made a great many trips in that time.
Q. What I am trying to get at is how many trips did you make per week in your regular duties as locomotive engineer?
A. About three round trips a week, three and a half.
Q. I will ask you to state to the jury what the fact is as to whether you did or did not become thoroughly familiar with the track from Hope to Spokane?
A. Yes, perfectly familiar with the track.
Q. What were you doing on the 13th day of November, 1898?
A. I was engineer on train No. 1 from Hope.
Q. What was the number of your engine?
A. 220.
Q. What sort of an engine was that?
A. An engine known as class B, Schenectady locomotive.
Q. What was that, a small or large engine, and if so state to the jury the difference between it and the other classes of engines.
A. A very large engine, one of the largest in the United States; I would not say the largest, but one of the largest.
Q. How was the center of gravity on that engine with reference to location as compared with the smaller engines that are sometimes run?

311 A. The Baldwin engines that were run on that run prior to that time and the engines that are running on there at the present time, the center of gravity was thirteen inches lower than this Schenectady engine.

Q. What difference, if any, did that make in their ability to make fast speed around curves?
A. The lower the center of gravity would be in a case of that kind the better the engine would curve; it would curve with more safety.
Q. What is the fact as to whether you ran during your service always this kind of an engine or whether you would run different kinds of engines around there?
A. I had run the Baldwin engines. At that time I had run a Baldwin engine about the same length of time on the run as I had the Schenectady.
Q. With which engine did you make in actual practice the fastest time around the curves?

Mr. R. H. VOORHEES: I object to that as utterly immaterial what engine he made the fastest time with around those curves, whether he made the fastest time with one or the other.

Mr. THOMPSON: It is important to show the kind of engine he was operating and how it operated on that day.

(Objection overruled. Plaintiffs allowed an exception.)

A. The difference between the Schenectady engine and the Baldwins is that around those curves we usually run the Baldwin engines at a speed from five to ten miles an hour faster, around those six and seven degree curves than they did the Schenectady engines.

312 Q. Do you recall or do you not the trip from Hope, Idaho, to Spokane, Washington, on the 13th of November, 1898, on the afternoon of that day?

A. Yes, sir; I remember the trip well.

Q. What time did you leave Hope, Idaho, on that date?

A. We left Hope, Idaho, at 4:15 p. m.

Q. How do you know that fact?

A. From the fact that I had compared time with the conductor before leaving.

Q. Who was your conductor?

A. Samuel Long.

Q. The gentleman who has just testified?

A. Yes, sir.

Q. Who was your fireman on that day?

A. Thomas O'Neill.

Q. Do you know who the front brakeman was?

A. I believe the head brakeman's name was Adams.

Q. Do you know what his first name was?

A. No, sir; I do not.

Q. Do you know who the other brakeman was?

A. Yes, sir; it was—I know the man well and I cannot——

Q. (Interrupting.) Do you know whether it was Mr. Lawrence?

A. Lawrence, that is the name.

Q. Do you know what his first name is?

A. No, sir; I do not.

Q. Did you have anything to do with the brakemen in service on the road?

313 A. No, sir; I don't think I saw either of the brakemen on the whole trip.

Q. Where did you and the conductor compare your time together when you were at Hope, Idaho—at what location about the train?

A. The conductor was standing opposite the engine at the west end of the platform.

Q. Where were you?

A. I was standing on the platform.

Q. The platform of the depot or the engine?

A. The platform of the depot.

Q. And about or near the engine?

A. Right opposite the engine, between the engine and the tender.

Q. Do you know what time it was when you compared your time?

A. 4:14.

Q. How soon after you compared your time did you start?

A. In one minute after we compared time the train started moving.

Q. What is the fact as to whether it was light or dusk at that time?

A. Light; quite light, it was fully as light as it is now.

Q. State to the jury what you did in pulling out from Hope and running towards the Pack River trestle as to attaining any particular degree of speed; describe to the jury what you did.

A. In pulling out of Hope to the west end of the yard we
314 had probably attained a speed of twenty miles an hour.

Q. How far is the west end of the yard from Hope station?

A. I should judge about six or seven hundred feet.

Q. And then from leaving the yard what did you do as to increasing or diminishing speed?

A. At one-half mile west of Hope the speed was increased to about thirty-five miles an hour.

Q. How long was that maintained, or was it increased or decreased?

A. It was increased to a certain extent, until Pack River trestle was reached.

Q. What rate of speed were you going when you approached Pack River trestle?

A. A few feet west of Pack River trestle, at the point known as mile post 3——

Q. (Interrupting.) Do you mean west or east of Pack river?

A. East of Pack River trestle.

Q. Before reaching the trestle?

A. Yes, sir.

Q. Describe what your speed was.

A. The engine was shut off at a speed of about forty miles an hour.

Q. What post, sign, or anything was there there to notify you what to do?

A. There is a post at the end of the bridge with notice on that all trains should use four minutes crossing this bridge, but at that date that notice was not in effect; the speed was restricted on the bridge, or on what is known as the curved portion of the trestle.

315 Q. What was it restricted to?

A. To thirty miles an hour.

Q. At what rate of speed? You say the steam was shut off at that point; at what rate of speed did you pass over the Pack River trestle?

A. The speed I should judge on approaching the trestle would be probably about thirty-eight miles an hour, and the train drifted across almost the entire length of the trestle.

Q. What do you mean by "drifted?"

A. Being shut off, and the train rolled along from the momentum of the train until I started working steam a few feet off the west end of the trestle.

Q. When you say a few feet off, do you mean after you had passed off, or before you had left the trestle?

A. Before I had left the trestle, probably about two or three hundred feet, something like that; I could not just be positive as to the number of feet.

Q. What had resulted from your drfting or rolling across the trestle only by your own momentum, whether the train had increased or decreased its speed?

A. It had decreased.

Q. To about what would you say it had decreased when you reached a point about two or three hundred feet before passing off the trestle?

A. I should judge along about twenty-five miles an hour.

Q. How high was that trestle at ordinary low water above the lake?

A. I think about eighteen feet.

316 Q. What did you notice, if anything, of the condition of the lake at that time?

A. At that time of the year the lake is quite low.

Q. What was the condition of the lake on that afternoon as to being smooth, placid or boisterous?

A. The lake was quite rough that afternoon.

Q. What indication did you have of is being rough, what called your attention to it?

A. There were whitecaps rolling.

Q. When you got within two or three hundred feet of the west end of the Pack River trestle what did you do as to increasing speed or otherwise?

A. Gradually increased speed.

Q. What rate of speed did you say that you passed over the end of the Pack River trestle at the west end?

A. About twenty-five or twenty-eight miles an hour.

Q. What did you do as to continually increasing your speed or otherwise after that?

A. At a point west of Pack River secion house, or the west end of the trestle, at a point about one-half mile west we had attained a speed of about thirty-five miles an hour

Q. A half mile west of the trestle?

A. Yes, sir.

Q. What did you do then as to either increasing or diminishing the speed?

A. That speed was maintained, pretty close to that speed, until the eight-mile post was passed.

Q. What was the highest rate of speed you had attained from the time you left the westerly end of the Pack River trestle until

317 you passed the eight-mile post, some distance before reaching Oden, a half a mile before you reached Oden—from the Pack River trestle to the eight-mile post, wha was the highest degree of speed you attained?

A. The highest degree of speed attained in that distance would be about thirty-seven miles an hour.

Q. At what rate of speed would you say to the jury you passed

around the six-degree curve between the six mile post and the seven mile post?

A. Thirty-five miles an hour.

Q. State what the fact is as to whether you ever had pointed out to you the place where it is supposed Mr. Adams' body was found.

A. Yes, sir; I have.

Q. Where did you understand that place to be?

A. I understood that place to be at a point a quarter of a mile east of mile post 7.

Q. A quarter of a mile east of mile post 7. Now, is that the only six-degree curve there is there?

A. Further west there is——

Q. (Interrupting.) Yes, but about that point?

A. Yes, I think that is about the only six-degree curve there is there.

Q. How near was the lake water edge on the 13th day of November, 1898, to the railroad line at that point?

A. At that point I should judge about one hundred and fifty feet.

Q. What do you know, if anything, as to whether the lake remained stationary that year at about that point, or whether there was a rise or a fall of the lake?

318 A. The lake usually, along the latter part of May until the last of June, gets quite high; in fact I have seen the water over the track.

Mr. R. H. VOORHEES: I object to the answer as irresponsive and move to strike it out.

(Objection overruled and motion denied. Exception allowed.)

Q. To what elevation did the water of the lake reach in the succeeding spring and summer or the spring and summer of 1899, along at that point?

A. I could not be positive at that time, for in fact I was not running there.

Q. You don't know as a matter of fact, then, what it was?

A. But usually the water came up within four feet—from four to six or eight feet of the track in high water.

Q. Now, you may state to the jury on the particular day in question what rate of speed you maintained after leaving the eight-mile post and going on to Oden.

A. The speed after passing the eight-mile post was increased.

Q. Why?

A. Just west of Oden there is what is known as a one per cent. grade, and in order to maintain a good high rate of speed over that we usually take what we call a run for that hill, so that in passing through Oden we had attained a speed at the west end of Oden, at the side-track directly at the nine-mile post, of between fifty and fifty-five miles an hour.

Q. What did you do on that particular day—is that what you mean you did on that particular day?

319 A. On that particular day we had passed the nine-mile post at fully fifty miles an hour; I would not be positive, but between fifty and fifty-five miles an hour.

Q. And how long was that speed maintained in going towards Oden or passing Oden?

A. That speed would be maintained for about three-quarters of a mile west.

Q. That would carry you where?

A. That would carry us—well, on to that one per cent. grade, the speed being slightly decreased from there until the eleven-mile post was passed.

Q. Why was that decrease?

A. On account of the heavy grade. The engine was not capable of developing the speed on a one per cent. grade that we should do on a level track.

Q. A one per cent. grade would be fifty-two and eight-tenths feet per mile, would it not?

A. Yes, sir.

Q. Where did that grade extend?

A. Almost to the eleven-mile post.

Q. That would be at this point that I have noted on the map and not far east of Kootenai, would it?

A. That would be just a little better than a mile east of Kootenai about, probably a mile and a quarter.

Q. What would be the fact as to whether you maintained a regular speed up that grade, or whether it was increasing or diminishing?

A. The speed was decreasing from one-half to three-quarters of a mile west of Oden, until about the eleven-mile post was reached.

320 Q. What rate of speed had you reached, about the time when you passed the eleven-mile post?

A. Take at the eleven-mile post, the speed would be about forty-two to forty-five miles an hour.

Q. How far after passing the eleven-mile post was it before you got rid of that grade?

A. In passing the eleven-mile post we struck the one-half per cent. grade; that is twenty-six feet grade, down grade.

Q. You then turned over the summit and started down towards Kootenai?

A. Yes, sir.

Q. What was done after rounding that summit?

A. The speed was decreased after passing the eleven-mile post until we had passed through Kootenai, we had attained a speed of about fifty miles an hour.

Q. You mean increased?

A. After passing Kootenai, increased to about fifty miles per hour, and I think that the mile board west of Kootenai was passed about fifty-five miles an hour.

Q. That would be the twelve-mile post west of Kootenai?

A. That would be about the thirteen-mile post; that is the mile post west of Kootenai.

Q. The first mile post west of Kootenai?

A. Yes, sir; we had left it, about the thirteenth mile post.

Q. That was increased to the thirteenth mile post. That would be about a little more than half way down the long tangent?

A. Yes, sir.

Q. At what rate of speed had you attained when you passed the thirteenth mile post?

321 A. We were coming pretty welll on to sixty, between fifty-five and sixty.

Q. What took place between there and Sandpoint?

A. To Sandpoint almost a uniform rate of speed of sixty miles an hour and a little over was maintained.

Q. Until what point, until you actually reached Sandpoint or before or after that?

A. The steam was shut off about a mile before that.

Q. Sandpoint was sixteen miles from Hope, and that would be about the fifteen-mile where you shut off steam?

A. Yes, sir.

Q. What is the grade as to being up or down grade there?

A. About one-half of one per cent., twenty-six feet to the mile.

Q. Down-grade?

A. Down-grade.

Q. What effect did the shutting off of the steam have upon the train, whether it decreased the speed or not?

A. It did not decrease the speed very much on that train; the brakes were applied.

(Cross:)

Q. Where did you say you shut off steam?

A. At the fifteen-mile post, one mile east of Sandpoint.

(Direct resumed:)

Q. And you say that did not decrease the speed much until you applied the brakes?

A. No, sir; the brakes were applied allmost instantly after the steam was shut off.

Q. What is the fact as to whether you did or did not stop at Sandpoint?

A. We stopped at Sandpoint.

322 Q. Have you any personal recollection now as to the length of your run, the length of time that elapsed from Hope to Sandpoint?

A. Yes, sir.

Q. What was it?

A. Twenty-four minutes.

Q. How long did you remain at Sandpoint?

A. One minute.

Q. What did you do at Sandpoint?

A. At Sandpoint we stopped and were ready for a signal to go any time.

Q. Who, if anyone, gave you a signal to start?

A. The conductor.

Q. Where was he at the time?

A. He was on the platform, but of course he gave the signal to the fireman; I took the signal from the fireman; I was on the right side and the depot was on the left.

Q. What was the condition of the light at that point, whether it was still daylight or whether it was dark?

A. Quite light, getting darker, though.

Q. What did you do upon receiving the signal at Sandpoint?

A. Started.

Q. What rate of speed, if any, did you attain and how soon?

A. To about the trestle, the first part of the trestle known as the lower part, we had attained a speed of about thirty-five miles an hour.

Q. How far is that trestle from Sandpoint?

A. That train runs up to within an eighth or a tenth of a mile of the depot.

Q. Can you say at about what part you had attained a speed of thirty-five miles an hour?

323 A. About one-half mile west.

Q. What orders, if any, did you receive at Sandpoint, or did you receive any?

A. No orders at Sandpoint.

Q. What orders, if any, did you receive at Hope?

A. We received an order at Hope, an order and clearance.

Q. What is the fact as to whether you ran by wire from that time on or did not?

A. Ran by wire, telegraphic orders.

Q. What was your order with reference to the time that you were to run to Spokane?

A. Our order was such as to allow us to make up a given hour, the time on the schedule.

Q. What time would that require you to be at Spokane?

A. At 6:10.

Q. You may state what the fact is as to whether you did in fact reach Spokane at 6:10.

A. 6:10 was the time.

Q. Now, when you left Sandpoint and reached a point west on the trestle west of Sandpoint, and were going about thirty-five miles an hour, what did you do as to increasing or diminishing that in passing over the trestle?

A. The speed was likely decreased until——

Q. (Interrupting.) What is the fact about that?

A. Down to about thirty miles per hour.

Q. How much of a trestle was that?

A. I think that trestle is about seven thousand two hundred or seven thousand three hundred feet long; that is the entire length, but part of it has been filled in.

324 Q. Something like a mile and a half long?

A. Yes, sir.

(Cross:)

Q. What trestle is that?

A. Sandpoint.

(Direct resumed:)

Q. How high is that trestle above the outlet of Pend d'Oreille lake?

A. That is about the same as Pack river above low water, it is about eighteen feet.

Q. What is it as to being a curve or straight trestle?

A. It is a straight trestle east of the first few feet of the bridge; the turn is crooked, but west of that it is a straight trestle.

Q. What, if anything, attracted your attention in crossing that trestle or what did you do?

A. I worked steam until we had attained a speed of about thirty-five miles an hour and probably worked steam a little longer until we came within a half a mile of what is known as the draw, at a high part of the trestle.

Q. When you speak of the draw, what do you mean by that?

A. The drawbridge; there is a draw in the bridge to permit steamboats to pass up and down the lake.

Q. The bridge swings there, does it, or lifts?

A. Lifts.

Q. What did you do there?

A. That was passed at a speed of about thirty miles an hour; immediately after passing that I started working steam and had attained a speed between there and Algoma of about fifty-five miles an hour.

325 Q. What was the condition of the light at the time you passed across this trestle over the outlet of Pend d'Oreille lake?

A. It was quite light, light enough to read.

Q. Why do you say it was light enough to read?

A. I read my orders passing over the bridge.

Q. What occasion was there for your reading the orders?

A. As a matter of precaution, read them over the second time; we always do.

Q. Why did you choose that place rather than another?

A. That track being straight, no obstructions in any way, a clear distance for about one mile, and not running at a rate of speed that I would around the curves after leaving there.

Q. After passing off of that trestle, what did you do, if anything? I will ask you what light did you use or lamp or candle for the purpose of reading your orders at that time?

A. I used no light whatever.

Q. What light did you read them by?

A. Just held them up in front of the window, the same as I would do here.

Q. What I am trying to get at is whether by daylight or not?

A. By daylight.

Q. Tell us how you distributed the speed to Spokane, from that trestle, *till* Spokane?

A. From there to Spokane the speed was increased, the track being

in better condition for a high rate of speed than it was at
326 Sandpoint, we had run along from fifty-five to sixty miles an hour, perhaps touched seventy at places.

Q. Where, if at all, did you touch seventy miles?

A. Between Athol and Rathdrum.

Q. What, if anything, was there unusual in your attaining such a speed over that track?

A. That was a common practice, for an engine that was capable of developing that speed.

Q. What was the condition of that track, as to being straight or otherwise?

A. The track from Athol to Rathdrum, is almost straight; there is one curve, probably about a three-degree curve, something like that; the rest of the track is straight.

Q. How from Rathdrum into Spokane?

A. From Rathdrum into Spokane the track—well, really it is straight—there is one pretty sharp curve out here at Trent, probably a six-degree curve.

Q. Have you any memory of your own as to what *the* amount of time was actually occupied by you in running from Hope to Sandpoint?

A. Yes, sir; I remember that.

Q. How much time did you occupy?

A. Twenty-four minutes.

Q. What was there unusual in that amount of time being occupied in running that sixteen miles?

A. Nothing unusual; I have often run it in less time, very often.

Q. What is the fact as to whether you had run it both on schedule time and off schedule time?

327 A. We had run it on schedules and off schedules; we consider a telegraphic order our schedule if we are running on them.

Q. But when you had no telegraphic orders do you know whether you had always had the same schedule to run on as you did this time?

A. In a great many cases on delayed trains in leaving a place like Hope or any other terminal, in a case of that kind, if the train was thirty minutes late——

Q. (Interrupting.) What I am trying to get at is whether this particular schedule which you were running on this particular time was the only schedule you had ever had on that division?

A. Oh, no, we have had lots of them.

Q. What is the fact as to whether you had had schedules that required you to run from Hope to Sandpoint in about twenty-four minutes and run it regularly on schedule?

A. We have had schedule time from Sandpoint to Hope in twenty-five minutes.

Q. How long did you run on that, in regular schedule time?

A. The summer of 1896 that schedule was in force nearly all summer; trains No. 1 and 2 used to meet at Sandpoint.

Q. What is the fact as to whether you ever did or did not run that distance in less than the twenty-four minutes that you say you occupied on this day?

A. Oh, I have run it a number of times in less.

Q. How much less?

328 A. I have made that run in nineteen minutes.

Q. Did you ever make it in anything between nineteen and twenty-four?

A. I have made it in twenty-one minutes often, quite often, ran a train and having the right of track, had a meeting point between Hope and Sandpoint.

Q. Anything unusual in the motion of your train when you took it in from nineteen to twenty-one minutes?

A. Nothing that I had ever seen or noticed.

Q. What was the character of the track from Hope to Sandpoint as to being smooth, well ballasted, heavy rails, or otherwise?

A. At that time of the year the track is usually in the pink of condition.

Q. How was it on that particular day?

A. It was good, very good.

Q. In the run from Hope to Spokane on that particular day. What unusual motion or lurching of your engine did you discover?

A. Why, nothing, none.

Q. What was there to prevent your discovering it if any such motion occurred?

A. If there was any lurching or throw on the track I certainly would have discovered it on the engine before it would be noticed on the cars.

Q. What is the fact as to whether any inequality in the track or any unusual speed around curves is or is not more noticeable in the engine than in the cars?

A. In all cases, especially with a large engine, it is more noticeable in an engine than in the cars.

329 Q. And you say you noticed nothing of the kind on that particular day?

A. Nothing of the kind.

Q. What is the next station past Sandpoint, if you remember?

A. The next station is Algomar—west?

Q. Yes, sir. Did you stop at Algomar?

A. No.

Q. What is the next station after passing Algomar?

A. Cocolalla.

Q. Did you stop at Cocolalla?

A. No, sir.

Q. What is the next station after Cocolalla?

A. Granite.

Q. Did you stop there?

A. No, sir; we reduced speed.

Q. What is the next station west of there?

A. Athol.

Q. Did you stop there?

A. No, sir.
Q. Did you pass any train there?
A. I believe we passed a freight train there.
Q. What did you have to do, if anything, to get out of the way of it?
A. Nothing; the track was clear.
Q. What rate of speed did you pass through Athol?
A. About fifty-eight miles; fifty-five or fifty-eight miles an hour.
Q. What is the next station west of Athol?
A. Ramsey.
Q. What did you do at that station?
A. Went through there about sixty miles an hour.
Q. What was the next station west of that?
A. There is a station there named Sheridan; I don't recollect if that station was there at that time or not.
330 Q. Did you stop at any station before getting to Rathdrum?
A. Rathdrum was the first stop.
Q. How long did you stop at Rathdrum?
A. I think we stopped at Rathdrum about two minutes, between a minute and a half and two minutes.
Q. What did you do at Rathdrum?
A. At Rathdrum I got off the engine, as is customary, and oiled the engine around a little.
Q. Anything else? Did you make two stops there or only one?
A. No, sir; only one stop.
Q. What did you do as to taking water there?
A. Took no water; took no water from Hope to Spokane.
Q. After leaving Rathdrum, how far is it to Spokane?
A. Twenty-seven miles.
Q. What stop, if any, did you make between Rathdrum and Spokane?
A. Stopped at the O. R. & N. crossing.
Q. How far from Spokane?
A. Five miles and a quarter east of Spokane.
Q. In the twenty-one and three-quarter miles from Rathdrum to that crossing, what stop did you make?
A. We made no stop.
Q. What sort of a track was that, whether comparatively straight or otherwise?
A. Comparatively straight; there are a few curves.
Q. How is that as to having heavy grades upon it or is it comparatively level?
A. It is slightly down grade, slightly up and down grade, just that kind of track that you could attain a greater speed over than you could over level track.
331 Q. What rate of speed did you actually attain between Rathdrum and the O. R. & N. crossing?
A. The speed varied considerably; we slowed down to about thirty-five miles an hour at Trent on a six-degree curve there.
Q. At Trent?

A. Yes, sir; but maintained an average rate of speed of about fifty to sixty miles an hour.

Q. Did you pass sixty at any time?

A. Yes, I think we did at certain points.

Q. Where did you attain the highest possible speed, or the highest speed you did attain on that trip from Hope to Spokane?

A. From Hope to Spokane the highest rate of speed attained was between Athol and Rathdrum.

Q. What would you say that was?

A. About seventy miles an hour.

Q. When you reached the O. R. & N. crossing, did you stop or only slow up?

A. I stopped, just a slight stop; just enough for to let the wheels stop, and moved on.

Q. From there into Spokane what did you do as to maintaining any particular character of speed?

A. We came quite lively from the O. R. & N. crossing until we had come down close onto Sprague street.

Q. What would you say pretty lively was?

A. About thirty-five miles an hour.

Q. And when you got down there to about the crossing of Sprague street, what did you do as to slowing at the crossing of Sprague street or otherwise?

332 A. I came down to about eight or ten miles an hour and rolled into the depot.

Q. And reached the depot at what time?

A. At 6:10.

Q. Now, Mr. Matheson, I will ask you to state to the jury what the fact is under your oath as to what was the highest degree of speed you attained from the time you left the west end of the Pack River trestle until you passed the eight-mile post coming west; what would you say to the jury under your oath was the highest rate of speed that you touched in that distance?

A. Well, in that distance over a fraction of a mile we may have run to a speed as high as thirty-seven miles an hour, but we did not maintain a speed of thirty-six miles an hour for the full distance of one mile in that distance, that being a minute and forty seconds to the mile, for a full mile. The speed varied at certain points, of course, probably thirty-four, thirty-five, thirty-six and thirty-seven and so o It is hard to keep one rate of speed.

Q. What do you say to this jury as to whether you did or did not reach a speed of forty miles an hour at any point after leaving the west end of the Pack River trestle and before passing the eight-mile post?

A. I did not; I did not reach a speed of forty miles an hour for any part of a mile.

Q. Mr. Matheson, with what degree of accuracy can you as an engineer, or could you at that time as a locomotive engineer, measure the speed of your engine when you were flying over the road at different rates of speed; with what degree of accuracy can you judge that speed?

333 A. Oh, well, of course up to a speed of about fifty or sixty miles an hour I can come within two miles an hour of it; up to forty miles an hour I can come pretty close to it, but, of course, as high as sixty or seventy miles an hour that is a different proposition; we have only been doing that for the last couple of years or three years.

Q. Up to forty miles an hour, how far can you come to the actual speed that you are running?

A. I will bet a dollar on every mile, within a mile of it.

Q. Within a mile per hour of the speed you are running?

A. Yes, sir.

Mr. C. S. VOORHEES: I object to that. I think it is incompetent for the witness to bet anything in your honor's court.

Q. Now, Mr. Matheson, is that something unusual in your particular case, or does the business of an engineer and the running of a train enable one to do that?

A. A man that has been in the profession for a number of years, twenty years or like that, it does not require anything but an ordinary man to do that; any railroad man ought to be able to.

Q. When you are required to run a distance of fifteen or sixteen miles—sixteen, say from Hope to Sandpoint, and to make the distance in twenty-four minutes, do you find any difficulty in measuring the rate of speed so as to arrive there at the appointed time?

334 A. Not at all; dividing the speed up on a track like that; the way we usually do we run at a low rate of speed around these curves and run fast on good straight track. As a rule, if we would start right out of Hope and make up all our time on crooked track and then run behind on straight track, that would not look reasonable if a person should do that.

Q. Did you do that on this particular day?

A. Why, no.

Cross-examination.

(By Mr. R. H. VOORHEES:)

Q. Mr. Matheson, at what time did you get your orders that night at Hope?

A. I got the order at 4:14.

Q. 4:14?

A. That is what I said.

Q. How did you get your orders?

A. It was delivered to me by the conductor of the train.

Q. At 4:14?

A. Yes, sir.

Q. When did you figure out the rate of speed that you were to run at, having received your orders at 4:14?

A. After starting out.

Q. How did you figure it?

A. Figured on dividing up the speed over the entire district.

Q. Did you figure it in your head?

A. Yes, sir.

Q. How long did it take you to figure that out, what exact speed you were to make for each mile between Hope and Spokane?

A. It did not take very long, a man that had made the number of trips over that district that I had made ought to be able to tell it without doing much figuring.

335 Q. Just figured in your head for each mile between Hope and Spokane?

A. I did not say that I figured out each mile between Hope and Spokane.

Q. How did you figure it?

A. I just figured it the entire run, distributing the running between Hope and Sandpoint, and Sandpoint and Rathdrum, and Rathdrum to Spokane.

Q. Had you fixed that before you got to the trestle?

A. I had done that hundreds and hundreds of times——

Q. I am not asking you about hundreds of times.

A. (continued). Consequently I had that fixed——

Q. (Interrupting.) Wait a minute. Answer my question, if you please.

A. I will answer your questions, all of them.

Q. You may answer that, if you please. Had you figured out this, about the time that you reached the trestle?

A. I say that I had that figured out before I reached the mile board out of Hope.

Q. Within the first mile out of Hope?

A. Yes, sir.

Q. Now, Mr. Matheson, please give me the speed that you made for the first mile out of Hope.

A. At the mile post out of Hope the speed was about thirty-five miles per hour, from the start to about thirty-five miles an hour one mile west of Hope.

Q. Steadily running up?

A. Steadily running up.

Q. The second mile out of Hope?

A. About the same rate of speed, almost a uniform rate of speed of thirty-five miles an hour.

336 Q. And the third mile?

A. About the same, probably increased a little the third mile, we got up close onto forty for a fraction of a mile; we did not maintain that speed for a full mile, though.

Q. And in that fraction of a mile that you were over forty, that was the fraction of a mile east of the trestle?

A. That was about the three-mile post, just a few feet east of the trestle.

Q. Do you remember the time it took you to run to the trestle?

A. No, sir; I do not; I know the rate of speed run though.

Q. What rate did you run that fraction of a mile at?

A. The speed varied; the speed varied from thirty-five along about thirty-seven up to forty.

Q. In that fraction?

A. It might have touched forty, just about.

Q. You could not say whether it was thirty-seven or forty?

A. I say that the speed was up as high as forty miles an hour in that mile.

Q. In that fraction of a mile?

A. In that fraction of a mile, not to maintain a speed of forty miles an hour for the entire length of the mile; which would be one minute and forty seconds; I did not mean that; I meant that a fraction of that mile was run, a fraction of that mile between mile post 2 and 3, at the rate of forty miles an hour.

337 Q. Where did you begin to slow up to cross that trestle?

A. The engine was about at the three-mile post east of the trestle, probably about three or four hundred feet, and allowed the engine to drift the entire length, to drift almost to within a few hundred feet of the west end.

Q. Then at the three-mile post you shut off steam there a fraction of a mile between the three-mile post and the trestle?

A. That is a part of the mile, as I have already stated.

Q. Didn't you run that slower than that, thirty-seven or forty miles an hour, that fraction?

A. The speed would gradually be increased necessarily after the engine is shut off on level track; it would be slightly increased.

Q. Decreased you mean?

A. Decreased; approaching the trestle the speed was probably about thirty-eight miles an hour.

Q. And what rate did you go over the trestle at?

A. Across the entire length of the trestle at a speed of from thirty-eight to about twenty-five or twenty-eight miles an hour.

Q. How close to the west end?

A. Within a few hundred feet of the west end, probably two or three hundred feet. I could not say just exactly the number of feet; but somewhere along about that.

Q. Then what did you do?

A. Started working steam.

338 Q. That means you pulled the throttle open, does it not, Mr. Matheson?

A. We pulled the throttle open and also handled the adjustment of the distribution of the steam in the cylinders with the reverse lever.

Q. That increased your speed?

A. It certainly would.

Q. Now, the first mile west of the trestle, what rate did you run?

A. At a half mile west of the trestle the speed was about thirty-five miles an hour.

Q. You gradually ran it up from the end of the trestle to that point?

A. To that point; from that point on we had maintained almost an average rate of speed of thirty-five, varying a little above and below, until the eight-mile post was passed.

Q. In the second mile from the trestle you ran at the rate of thirty-five to thirty-six miles?

A. The second from the trestle?

Q. Yes, sir.

A. Along about thirty-five miles an hour, thirty-five probably at points reaching thirty-seven miles an hour, not to exceed that.

Q. Now, at the six-degree curve or point of accident, what was the rate there?

A. The rate there was thirty-five miles an hour.

Q. You are absolutely sure of that?

A. Well, it might have been thirty-four, but about thirty-
339 five—about thirty-four or thirty-five miles an hour; I am positive it was not thirty-six or thirty-seven, positive of that.

Q. Now, the next mile after the third mile from the trestle, what speed did you make?

A. The speed was increased there.

Q. In the third mile?

A. Yes, sir; the third mile west.

Q. And the third mile west of the trestle, what was it increased?

A. That would be about to forty miles an hour, along there.

Q. And the third mile from the trestle, that would be just beyond this point of accident, would it not?

A. I think the accident happened about a mile and a half west of the trestle, if I remember right.

Q. Then in the third mile, or the mile beyond where the accident happened, you increased?

A. I say that west of the eight-mile post the speed was increased.

Q. I am speaking of the third mile from the trestle, what did you do in that mile?

A. The third, that would be between the seven and eight, would it not?

Q. The third mile from the west would be just three miles from the trestle. I want to know what you did in the third mile from the trestle?

A. The speed was gradually increased there.

Q. In the third mile. And the increase continued in the third mile steadily up to what point?

A. Until the speed was checked on Oden hill.

340 Q. On Oden hill? Did you let the speed down after you had increased it in the third mile?

A. Until that reverse curve was passed I maintained probably about a uniform rate of speed of forty miles an hour.

Q. From the third mile?

A. Yes, sir,

Q. Whereabouts in that third mile did you begin to increase, do you remember?

A. I could not state just positively to the very spot where I began to increase the speed.

Q. Now, from the eighth-mile post at what rate did you run from the eighth-mile post west? At what rate were you running from the eight-mile post and a mile from the eight-mile post?

A. A speed of from thirty-seven to seventy miles an hour.
Q. In the mile beyond the eight-mile post?
A. I did not say a mile beyond, but west of there, between there and Spokane.
Q. I asked you what rate of speed you ran in the mile beyond the eight-mile post west?
A. Inside of that mile?
Q. Yes, sir.
A. We attained a speed of forty miles an hour inside of that, probably a little more.
Q. Did you let down any there?
A. No, sir; kept increasing.
Q. From the eight-mile post you kept increasing?
A. Yes, sir; that is what I said.
Q. Up to what point did you increase?
341 A. Up until we had reached about the ten-mile post, or between the nine and ten-mile post.
Q. Up to the ten-mile post; what were you making when you reached the ten-mile post?
A. The speed was probably about fifty miles an hour.
Q. You passed the ten-mile post at fifty miles an hour?
A. Just about.
Q. Did not let up there?
A. Yes, gradually until the time when the hill was passed.
Q. Where is the ten-mile post relative to the top of the hill?
A. Almost one mile from the top of the hill.
Q. The ten-mile post is a mile from the bottom of the hill?
A. The ten-mile post is just about half way up the hill.
Q. So that you were decreasing on that grade, but passed the ten-mile post you think at a speed of fifty miles per hour?
A. Close on to fifty.
Q. And were decreasing as you went on up the grade?
A. Yes, sir.
Q. Until you got to the top of the grade when the decrease had reached what point?
A. The top of the grade the speed was probably about forty-five miles an hour; forty-three to forty-five miles an hour; I could not say positively just to a mile there.
Q. Where is the eleven-mile post relative to the top of the grade?
A. The eleven-mile post is just a few feet west of the top of the grade.
342 Q. So that you ran the eleventh mile west of Hope, starting at the tenth mile at fifty miles an hour, you ran it until at the end of the mile you had reached a speed of from forty-two to forty-five miles?
A. Just about.
Q. On the up-grade? Now you say the eleventh-mile post is just beyond the top of the grade a few feet?
A. Just a few feet, probably two or three hundred feet, something like that.
Q. Then the down-grade begins?

A. Twenty-six feet down-grade there.
Q. Then you began to increase your speed?
A. Yes, sir.
Q. As you started down the grade?
A. Yes, sir.
Q. And did you increase your speed steadily during that mile?
A. Yes, sir.
Q. Until you had reached the twelfth-mile post—at what speed?
A. The speed would probably be about close onto fifty miles.
Q. Now in the twelfth mile, what speed did you run at, from the twelfth mile post to the thirteenth?
A. From fifty to about fifty-five.
Q. Now, from the thirteenth-mile post to the fourteenth, or for the thirteenth mile, what speed did you run at?

Mr. THOMPSON: That would be the fourteenth mile.

Q. I mean the mile between the thirteenth and fourteenth-mile posts, that would be the thirteenth mile?

343 A. Between the thirteenth and fourteenth-mile posts we attained a speed of sixty miles an hour there.

Q. Sixty miles an hour?
A. Almost sixty.
Q. You ran there substantially at sixty miles an hour?
A. Almost, to Sandpoint.
Q. Did you let down any place between the thirteenth-mile post and Sandpoint or the sixteenth-mile post?
A. No, sir; we ran past them.
Q. Increased the speed steadily up to Sandpoint?
A. To Sandpoint?
Q. Yes, sir.
A. To the station next Kootenai from the half mile west of Kootenai to Sandpoint.
Q. You did not decrease any, but increased right along up to Sandpoint.
A. Naturally decreased the speed in stopping the train.
Q. But only for the stop?
A. Yes, sir.
Q. Where did you stop relative to Sandpoint?
A. At the mile board, fifteen-mile post.
Q. How rapidly did you decrease the speed?
A. From about sixty miles or better to a stop.
Q. It took you about that mile to stop in going at that rate?
A. Yes, just about; I could have stopped in 1,380 feet if I had wanted to.
Q. You had a very powerful engine that night, did you not?
A. Quite powerful, yes.
Q. What speed was the engine capable of running at?

A. The engine was capable of developing a speed over cer-
344 tain portions of the track of one hundred miles an hour or close to it.

Q. Could it draw a train at that speed?

A. That engine has drawn a train at a speed of ninety-three miles an hour.

Q. Now, Mr. Matheson, what was the next station after Sandpoint?

A. Algomar.

Q. How far is Algomar?

A. Seven miles; I guess about seven or seven and a half, somewhere along there.

Q. At what rate did you run from Sandpoint to Algomar?

A. All the way from a start up to about fifty-five miles an hour until Algomar was passed.

Q. You passed Algomar at fifty-five?

A. Just about.

Q. What do you think you averaged between Sandpoint and Algomar?

A. I could not be positive just as to that.

Q. But you are certain about passing Algomar at about fifty-five miles an hour?

A. Yes, just about fifty-five; that is the average rate of speed through there.

Q. What is the next station after that?

A. The next is Cocolalla.

Q. How far is Cocolalla from Algomar?

A. Six miles and a fraction.

Q. Did you decrease speed between Algomar and *and* Cocolalla?

A. Slightly.

Q. Where?

345 A. At one point about two miles west.

Q. For what?

A. For being a twenty-six foot grade there.

Q. That slowed up because you were going up the grade?

A. Yes, sir.

Q. Is that the only place?

A. The speed was increased after passing the top of the grade.

Q. Now, from Algomar west what is the next station?

A. Cocolalla.

Q. The next after Cocolalla?

A. Granite.

Q. What speed did you pass Granite at?

A. We passed through Granite depot at a speed of about fifty miles an hour, and a quarter of a mile west of there to a half a mile at a speed of thirty-five miles an hour.

Q. Why a speed there of thirty-five miles?

A. On account of an eight-degree curve.

Q. West of there what is the next station?

A. Athol.

Q. And what was your rate of speed at Athol?

A. We passed through Athol at about fifty-five to fifty-eight miles an hour.

Q. How far is Athol from Cocolalla?

A. Athol to Cocolalla is thirteen and seven-tenths miles.

Q. Now, from Athol what speed did you make?
A. From Athol to Spokane?
Q. From Athol west to the next station?
A. From Athol to the next station all the way from fifty-eight to along about sixty-seven and seventy.
346 Q. How far is the next station?
A. The next station is about eight miles.
Q. What is the next station?
A. Ramsey, west of Athol.
Q. And you passed Ramsey at what?
A. We passed through Ramsey at a speed a little lower than it was west, to about a mile and a half east of there; we proceeded, passed through there about fifty-eight or sixty miles an hour, somewhere along there.
Q. What is the next station after that?
A. There is a station there named Sheridan; I don't just remember whether that station was there at that time; I rather think it was there.
Q. What speed did you pass it at?
A. About sixty or a little better.
Q. And what is the next one?
A. Rathdrum.
Q. How far is Rathdrum from Sheridan?
A. About a mile and three-quarters.
Q. Where did you begin to slow up for Rathdrum?
A. Just about a mile.
Q. You stopped at Rathdrum, didn't you?
A. Yes, sir.
Q. How long did you stop at Rathdrum?
A. We were at Rathdrum about a minute and a half or two minutes.
Q. Where prior to that had you stopped?
A. Sandpoint.
Q. How long did you stop at Sandpoint?
A. One minute.
Q. One minute?
A. About one minute.
347 Q. Don't you know that you stopped longer at Rathdrum than a minute and a half or two minutes?
A. No, I don't know; I think, though, about a minute and a half; I think two minutes would be the outside, probably a minute and a half.
Q. You are certain about that, are you?
A. I am pretty positive of that.
Q. You are pretty positive of it?
A. We might have exceeded two minutes a fraction, but I don't think we did; I think just about an even two minutes, from a minute and a half to two minutes.
Q. As sure of that as you are of these rates of speed at the various points along the road?
A. I am pretty positive of it all.

Q. Just about the same. You don't think you stopped there three minutes, do you?

A. No, I don't think anything of the kind.

Q. Pretty sure you did not, are you not?

A. Yes, pretty sure of it.

Q. Now, Mr. Matheson, you say that you had run from Hope to Sandpoint in less than twenty-four minutes often?

A. Often, quite often.

Q. That you have made the run in nineteen minutes?

A. I have.

Q. About what rate per hour would that be?

A. Nineteen minutes?

Q. Yes, sir.

A. From the start that would be about nearly sixty miles an hour.

Q. From Hope to Sandpoint?

348 A. Yes, sir; it would not be an average of sixty miles an hour of course, that would just take sixteen minutes, but you have got to figure in the start; it has got to be an average of better than fifty-five miles an hour.

Q. So that you have run from Hope to Sandpoint at an average rate of speed of between fifty-five and sixty miles an hour?

A. Yes, sir.

Q. You have done that frequently?

A. Nineteen minutes?

Q. Yes, sir.

A. No, sir.

Q. You stayed of course on the track that time?

A. If I had not, I would not be here, at that rate of speed.

Q. That is five minutes shorter than you made it this time—twenty-four minutes you made it this time, as I understand you?

A. Twenty-four, November 13th, 1898.

Q. When you were running it at nineteen minutes, did you notice any unusual motion in the engine?

A. Yes, I did, considerable.

Q. Lurched some then, didn't it?

A. Yes, I should think so.

Q. Now, you say that in running it at twenty-four minutes you did not notice any motion in the engine going around those curves, any lateral motion or jolting or lurching?

A. Nothing unusual in the twenty-four minutes.

Q. Do you know what your schedule rate was that day?

A. My schedule rate?

349 Q. Yes, sir; your ordinary schedule rate, not your extra-ordinary rate for that day, but your ordinary schedule rate, the time that the time-card fixes for running over that road?

A. That a particular time-card fixes I would not be very positive of that, but I know that on a great many cards the schedule was made for twenty-five minutes—twenty-five, twenty-seven, twenty-eight minutes.

Q. Will you say it was twenty-five, twenty-seven, or twenty-eight minutes on that schedule?

A. I would not say on that particular card. I cannot testify to something that I don't know. Now, I am not positive of that in regard to the schedule time covered by the card in that distance.

Q. You don't know what the schedule time you had been running on on that day was?

A. I don't remember the exact schedule time for that distance.

Q. You had probably been running the schedule for some time, had you not?

A. The chances are we had been running on that schedule for some time; of course, it is hard to tell, we might have been running on it a couple of weeks or two or three weeks; it is hard to tell.

Q. You had made a number of trips?

A. Probably, yes; I don't remember now how long the card was in effect.

Q. Now, on the day preceding this trip, you remember the rate of speed you made at any particular time on points along the road?

A. The date preceding that?

Q. Yes.

350 A. No, I don't remember the date preceding that, whether we were running on schedule time or if we were late, I could not say.

Q. Do you know the day after that?

A. No.

Q. You can't fix the date by any particular point along the road?

A. No, there was nothing happened to attract my attention in that way?

Q. Did anything happen on this trip to attract your attention?

A. On November 13th?

Q. While you were running on that trip, except that you were behind time?

A. On November 13th?

Q. Yes, sir.

A. Quite an unusual occurrence, sir.

Q. What happened that you knew of while you were making that run?

A. While I was making the run there was nothing that I was aware of until I had learned the facts the following day.

Q. The day after the run?

A. Yes, sir.

Q. So there was nothing during the run to impress the rates of speed on your mind?

A. Nothing at that time.

Q. You did not know that Mr. Adams was going to fall or had fallen off during the run, did you?

A. No, sir; I did not.

Q. Now, I will ask you, Mr. Matheson, as you went around those curves between Hope and Pack river, in regulating your speed, did you put on the brakes?

A. Between Hope and Pack river?

351 Q. Between the trestle and Oden?
A. Between Pack River trestle and Oden?
Q. Yes, sir.
A. At some point just east of Oden I applied the brakes slightly.
Q. Where was that?
A. That would be about—well, that would be probably a half a mile east of Oden.
Q. Is that the only place?
A. I applied the brakes slightly on a couple of curves there.
Q. What curves were they?
A. Well, one just about a half mile east of there, and one just after passing the eight mile post where we increased speed.
Q. How sharp are those curves?
A. There are curves in there that are six degree curves.
Q. Did you touch the air or put on the brake—I believe touching the air is putting on the brake—is it not, in railroad talk?
A. No, sir; we did not touch the air at all.
Q. Did you touch the air at any of those curves between Pack River trestle and Oden?
A. We touched the lever that regulates the air, yes, sir, by the brake.
Q. At all of the curves, at all of the six degree curves?
A. Not at all of the six degree curves; it was not considered necessary to do that in practical railroading at a speed of thirty-five miles an hour, but only when it is necessary.
352 Q. Didn't you touch it at some of the six degree curves? Didn't you touch the air when you were going around some of those six degree curves between the trestle and Oden?
A. At a speed exceeding thirty-five miles an hour I did, probably forty or thirty-five.
Q. Now, at this particular curve where the accident took place then you did not touch the air?
A. No, sir.
Q. You went around that without touching the air?
A. Yes, sir.
Q. What is the effect on the train of touching the air?
A. The effect of applying the brake is to stop the train if it is left there long enough.
Q. In going around a curve when you touch the air and put on the brake does it not stretch the train?
A. In going around the curve?
Q. Yes, sir.
A. It stretches the train, yes; it would be considered a dangerous practice to apply the brake on a curve; it is considered dangerous practice in railroading.
Q. Why did you put it on the curves after you increased the speed over thirty-five miles an hour if it is dangerous railroading?
A. I did not apply it on the curves; I applied it on the brakes approaching the curves.
Q. Then you stretched the train just before getting into a curve?
A. At a high rate of speed I did.

353 Q. Then it is not a dangerous thing to have a train go around a curve with the train stretched by the air brake, is it?

A. If the brake is applied before striking the curve; if the brake is not applied before striking the curve, then it is better not to apply the brake.

Q. But just before coming to the curve, if it is a high degree curve and you are going at high speed it is a good thing to stretch the train?

A. It sets the train around the curve.

Q. It sets the train around the curve; that is the effect of putting the air on at a curve?

A. Yes, sir.

Q. Or just before you get to the curve?

A. Yes, sir.

Q. It stretches it out and keeps the couplings stretched tight, is not that the idea, so that the train will move more as one piece?

A. It sets the brakes on the cars in passing around the curves; the bodies of the cars are always stretched tight.

Q. That makes the effect concentrate, makes the hinder cars drag on the other cars and stiffens them and stiffens the whole train?

A. It stiffens the train out, certainly.

Q. So that the cars ride around a curve more as one piece than separate cars; that is the idea, is it not?

A. It don't allow the lateral motion around the curve that it would with a train running at a high rate of speed if the brake was not applied.

Q. But you did not think it was necessary to touch the air at this particular six degree curve where Mr. Adams' body was thrown off?

354 A. Under no circumstances, at that rate of speed.

Q. You did not do it on that particular occasion?

A. Did not do it then, before, or don't do it now.

Q. Did you touch it at any of the six degree curves in this stretch of track between the Pack River trestle and Oden?

A. I have stated that I did, at a high rate of speed.

Q. When you were running thirty-seven miles an hour?

A. When I was running along thirty-seven to forty and forty-five I did.

Q. Did you get to forty-five miles an hour between the trestle and Oden?

A. Just approaching Oden I did.

Q. When the air is applied the jerk and lurching of the car going around a curve is less, is it not, when you are running at a high rate of speed?

A. If the brake is applied on a curve?

Q. No, before you get onto a curve.

A. Well, of course.

Q. If a train is stretched?

A. It stretches the train out, yes, sir.

Q. Now, Mr. Matheson, I will ask you what effect in regard to

lurching or jerking of the train going around that six degree curve would have at fifty miles an hour; would not the lurch and jar be very considerable in the cars?

A. No, sir, I don't think it would. I passed over those curves over two hundred times almost, at fifty miles an hour and never had any complaint.

Q. Over fifty miles an hour?

355 A. Yes, sir; I will venture to say over two hundred times at a speed of fifty miles an hour over those same curves.

Q. Did you ever do it at more than fifty miles an hour?

A. Yes, sir; I did.

Q. How high did you go?

A. With passenger trains?

Q. Yes, sir.

A. Along about fifty to fifty-five miles an hour; I don't think I ever passed around there with a passenger train at a speed to exceed fifty-five miles an hour but once, and that was not a regular passenger train.

Q. You say there was very little jar visible from that?

A. At fifty miles an hour?

Q. Yes.

A. Nothing visible with the class of power that we were running at that time, but——

Q. (Interrupting.) What would be the effect on the cars?

A. I have already stated that I have passed around those curves with lighter engines at a speed of fifty-five miles an hour and higher and heard no complaint. Of course, I don't ride in the cars, but if there was anything unusual occurred I would certainly hear of it and they would not permit the like to be done.

Q. Would the passengers come and tell you about it?

A. If anything unusual occurs in a train, in a case of that kind, any high or dangerous rate of speed, the conductor has got that right to pull the air signal and reduce the speed of the train, giving four blasts of the whistle.

356 Q. Do I understand you to say it is your opinion that there would be no unusual jarring or lurching of the train going at fifty or fifty five miles an hour around those curves—I mean of the train, not the engine.

A. Of the cars on that train, I don't consider that a speed of fifty miles an hour with a brake slightly applied before approaching one of those curves that there would be any visible jerking or jarring of the train if the track was in perfect condition.

Q. Suppose the air was not applied?

A. If the air was not applied the chances are that in approaching those curves that the cars might give considerable of a jerk, otherwise it would be likely to be a little uncomfortable to passengers in their seats.

Q. With regard to your usual rate of running from Pack river to Oden, were you running that evening about the same or less or higher?

A. That depends on the class of power. Take, for instance, if I had one of those high-class E-3 engines——

Q. (Interrupting.) Excuse me a moment. Didn't you have a usual rate of running at that time over that piece of track, a rate fixed by time-card?

A. That don't cut any figure on late trains; we were not running on time-cards on late trains.

Q. I am not talking about late trains, but usual time?

A. We have no fixed rate of speed in that distance or any other distance over the Idaho division.

Q. Did not have at that time?

A. No, sir; no fixed time for a certain train.

Q. No schedule, no fixed rate of schedule?

357 A. We had a schedule in effect at that time, the same as we have got now; the train is restricted to a certain speed.

Q. Don't that fix the speed?

A. That fixes the speed of that train on time, but when that train is late——

Q. (Interrupting.) That is what I am asking you about, Mr. Matheson. Didn't you have your usual rate of speed established to run by, by schedule?

A. No, of course not, not on that run; we were run by telegraphic orders.

Q. I am not asking about that run; I am asking the usual running of the passenger trains by a schedule, a fixed schedule. Didn't you have such a schedule?

A. You mean a regular time schedule?

Q. That is what I mean, yes, sir.

A. We had a schedule of that kind.

Q. Exactly so. Now, I am asking if you are running slower or faster over that piece of track than the usual rate of running fixed by that schedule?

A. I was probably running just about the same time, if I could remember the running time; I have already told you that I don't remember the time given us in that schedule between those points.

Q. You think, then, that you were running about the same time as your usual time?

A. Just about the time; just about the schedule time; at that time, the time would be about twenty-seven to twenty-eight minutes; that would be about the average rate along there.

358 Q. I will ask you if, on your prior examination, in response to this question: "Q. "What is the fact as to whether you did or did not pass more rapidly or more slowly upon this particular day, the 13th of November, 1898, in your trip westward over those curves around Lake Pend d'Oreille and around to half a mile beyond mile post No. 8 than you did regularly upon former occasions? Answer: I certainly did not pass as fast." Is that correct? Did you give that testimony at that time?

A. I certainly did not pass as fast—yes, I guess I did, as I did on some former trips.

Q. As you did regularly upon former occasions is the question,

and you respond: "I certainly did not pass as fast." I will ask you if you made that statement on your former examination in this case?

A. I guess if that is there, if that is the former testimony, I likely did.

Q. You think that is correct?

A. I do; I know it to be correct.

Q. That track between Hope and the trestle is very crooked, is it not, Mr. Matheson?

A. Oh, it is a crooked track, but it is not what I would term a very crooked track.

Q. That reverse curve that you have spoken of, where is that reverse curve there?

A. That reverse curve is just about a short distance west of mile post 8.

Q. Is that in point of fact a reverse curve?

A. It is what we call a reverse curve, or a compound curve, slight on one end.

359 Q. It is not in fact a reverse curve, is it? It has got a tangent between the two curves, has it not?

A. No.

Q. None whatever?

A. I don't think there is; I think it is a reverse curve, but it is slightly reversed at one end and quite sharp at the other.

Q. And no tangent between the two at all, no straight track?

A. I don't think there is; there may be a few feet; I could not be positive of that.

Q. Now, Mr. Matheson, you have stated that you did not think it necessary to stretch the train at six degree curves at thirty-five miles an hour and did not do so by touching the air?

A. Yes, sir; that is what I stated.

Q. That is correct?

A. That is correct.

Q. Now, I will ask you if on your former examination, in response to this question: "What did you do, if anything, in passing around these curves whenever they amounted to as high as four or five degrees, what do you do as to applying the air when you are going at a rate of thirty-five or thirty-seven miles an hour? A. Any of these curves that we passed at a rate as low as thirty-five miles an hour the brake was not applied. Q. The brake was not applied? A. But on any and all of the six degree curves or five or six in my judgment at a rate of about thirty-five miles an hour the brake was applied enough to stretch the train." Is that true? Do you remember that you gave that testimony?

360 A. I remember that, well—just the same as I have given now.

Q. Then at thirty-five miles an hour on those six degree curves did you touch the air and stretch the train?

A. Didn't you read that "about thirty-five miles an hour?"

Q. I did.

A. I say about thirty-five I did—by thirty-five I meant over, a little over.

Q. When you say about thirty-five you always mean a little over?

A. That is what it reads, isn't it?

Q. No, about thirty-five.

A. Yes, if I was positive it was only thirty-five I would not touch the brake. If I thought it was a little over I would.

Q. But you think when you say here: "But on any and all of the six degree curves, or five to six, in my judgment, at a rate of about thirty-five miles an hour, the brake was applied enough to stretch the train"—that means where the speed was higher than thirty-five miles an hour?

A. Yes, sir; a little over thirty-five miles an hour, in my judgment.

Q. Where you ran those curves at thirty-five miles an hour you did not touch the air at any of them?

A. At thirty-five miles an hour?

Q. Yes, sir.

A. No, if I was positive I was running around those curves at thirty-five miles an hour the brake was not applied on that day or before or since.

361 Q. And at that particular curve where Mr. Adams went off it was not?

A. No, sir; it was not.

Q. Didn't you testify on the former occasion that you had run around that curve at fifty miles an hour over three hundred times?

A. I think that I testified in this case prior to this that I had run over that curve, that I was positive of, over three hundred times, or three hundred different trips at a higher rate of speed than I ran it that day.

Q. Over that particular curve?

A. Yes, sir; to the best of my recollection.

Q. The question was asked you: "At what point, either then or otherwise, did you ever pass around that curve at a speed of fifty or sixty miles an hour? A. Oh, I probably passed around that curve at a speed of fifty miles an hour three hundred times." Is that correct?

A. That is correct.

Q. Then you were asked these questions: "What effect did that speed have, if any, upon the train as to giving it any rocking, rolling or lurching motion? A. Fifty miles an hour? Q. At fifty miles an hour. A. Track in good shape it would hardly be visible in the cars." Is that correct?

A. That is correct, yes, sir.

Q. You never rode in the cars to know just about that?

A. I have ridden a good many miles in the cars, a good many.

Q. Going around a six degree curve at fifty miles an hour?

362 A. Yes, sir; around a 6 degree curve at a higher rate of speed.

Q. Than fifty miles an hour?

A. I have run around six degree curves at a higher speed than that.

Q. And you think the swing of the cars going around that curve would be hardly visible in the cars?

A. Yes, sir; it would be scarcely visible with the train properly handled, proper elevation and all.

(Excused.)

THOMAS O'NEILL, testified as follows:

Direct examination.

(By Mr. THOMPSON:)

Q. State your name.
A. Thomas O'Neill.
Q. Where do you reside?
A. Spokane.
Q. What is your business?
A. Locomotive engineer.
Q. How long have you been a locomotive engineer?
A. About two years.
Q. What was your trade of service, if any, before you became locomotive engineer?
A. Locomotive fireman.
Q. How long were you a locomotive fireman and in what service?
A. About nine years, freight and passenger.
Q. And when the next service?
A. Northern Pacific.
Q. You may state your business, if any, before you became a fireman.
A. A watchman.
363 Q. How long have you been in the railway service altogether?
A. About thirteen years.
Q. On what division of the Northern Pacific railroad, if at all, were you engaged as fireman during the fall of the year 1898?
A. Idaho division.
Q. Who was your engineer?
A. D. H. Matheson.
Q. The gentleman who just passed from the witness stand?
A. Yes, sir.
Q. How long did you serve as fireman with him on that division?
A. I think about four or five months.
Q. You say that you have been for the last two years a locomotive engineer. What service were you in on the 13th day of November, 1898?
A. Locomotive fireman.
Q. And with Mr. Matheson as your engineer?
A. Yes, sir.
Q. I will ask you if you recall a trip from Hope, Idaho, to Spo-

kane, Washington, on the afternoon of the 13th day of November, 1898?

A. Yes, sir; I do.

Q. What service did you perform on that trip?

A. Fired the engine was all.

Q. Do you know of your own knowledge what time you left the station of Hope?

A. I believe Mr. Matheson told me 4:15.

Q. *You need not state what he told you unless you know of your own knowledge.* When you left Hope station what did you first do?

364 A. Began shoveling coal in the fire box is all I know.

Q. At what rate of speed did you pass from Hope station down to the Pack River trestle, if you can tell?

A. I think about thirty or thirty-five miles an hour.

Q. I will ask you to state to the jury what the fact is as to whether during the many years of your experience riding upon the engine, whether you became able or not to determine the rate of speed at which you were traveling?

A. Yes, sir; I think I have.

Q. How near could you come to the rate of speed when you were running up something from thirty five to fifty miles an hour?

A. About two or three, maybe four miles.

Q. You mean within three or four miles an hour of the rate of speed?

A. Yes, sir.

Q. Now, after leaving the station that you say and going towards Pack River trestle what were you doing when you reached the eastern end of Pack River trestle and rolled out upon that trestle?

A. I generally get up on the seat box there when they shut the engine off and roll across that trestle.

Q. Where was the engine shut off on that day?

A. A little east of the trestle.

Q. At what rate of speed had you been going at the time the engine was shut off?

A. I think about thirty-five miles an hour.

Q. At what rate of speed did you roll across the trestle?

A. Nearly the same until we got pretty well over to the other end.

365 Q. What was the condition or time of day as to its being light or dark at that time when you were rolling across that trestle?

A. It was light and cloudy.

Q. What was the condition of the lake as to being placid or stormy?

A. I won't say positively, but I think it was rough; I won't say for sure; I don't know.

Q. You don't recollect whether you observed it or not?

A. No, sir; I don't.

Q. How far did you pass along that trestle before anything was done to change the speed of the train?

A. We were pretty near over the trestle.
Q. What was done then?
A. Began working steam.
Q. You say pretty near over the trestle. Give the jury about an idea of what point on the trestle you had reached.
A. There is a whistling post about a quarter of a mile, I think, from the end of the trestle, they generally whistle for the station there, and they begin shortly after that to work steam.
Q. When you started in to working steam there, what rate of speed had you reached when you passed the Pack River section-house?
A. I guess maybe twenty-five or twenty-eight miles an hour.
Q. You had already slowed up on the trestle then in rolling across?
A. Yes, sir.
366 Q. What is the fact as to whether you continued to increase or did not continue to increase speed after that?
A. Oh, we increased speed there for a way.
Q. How far?
A. For a couple of miles.
Q. Do you recollect ever having pointed out to you the six-degree curve where it was supposed the body of Mr. Adams was found?
A. Yes, sir.
Q. Where is that six-degree curve, how is it located on the line with reference to the lake and with reference to the distance from Pack River trestle?
A. I think it is about a mile and a half from Pack River trestle.
Q. What rate of speed had you attained when you rounded that six-degree curve?
A. About thirty-five miles.
Q. What rate of speed had you reached when you passed the eight-mile post beyond there?
A. It was about the same, maybe a little slower rate after we left there, it was about the same for a mile, or so.
Q. Where did you begin to increase speed, if you did?
A. Just east of Oden.
Q. Will you describe to the jury to what extent the speed was increased?
A. Began going right after, as they generally call it, and walloped her right along from there to Sandpoint.
Q. What rate of speed did you reach after you passed Kootenai on top of the hill?
A. Fifty miles an hour.
Q. What is the fact as to whether the speed was increased or not between there and Sandpoint?
367 A. Yes, sir; it was.
Q. What rate of speed do you think you reached before you got to Sandpoint at the highest speed attained?
A. I did not pay particular attention, but I think it was faster than it was going through Oden; I think it went through Oden at about fifty miles an hour.

Q. Through Oden at fifty miles an hour?

A. Kootenai.

Q. And after passing Kootenai what do you say from there to Sandpoint?

A. We got a little higher, not a great deal, a little higher than that.

Q. How far out from Sandpoint was it before you began to slow up for the station?

A. *About a mile.*

Q. When you came to Sandpoint how long did you stop there—or did you stop at all?

A. I don't just recollect the stop; I could not say for sure, but it was very brief.

Q. What was the condition of the light when you got to Sandpoint, as to whether it was light or dark?

A. It was still light.

Q. From Sandpoint what did you do as to maintaining a particular degree of speed after that?

A. After, we went right along until we got over the trestle, and then we began to go from there up to Cocolalla and I did not pay much attention to the speed, but I know we were going fast; I could not say just how fast.

Q. After you passed Cocolalla what was the rate of speed maintained?

368 A. Through Cocolalla I guess we were going fifty miles an hour, easy.

Q. And from Cocolalla west, what was the next station?

A. Granite.

Q. And what kind of speed did you maintain along there?

A. About the same.

Q. And from there to Athol what kind of speed did you maintain?

A. I think we went through Athol about forty-five miles an hour.

Q. After passing Athol what speed did you maintain?

A. I give it up then.

Q. Well, what is the fact as to whether you got faster or slower?

A. We got faster.

Q How much faster?

A. I thought about sixty miles an hour.

Q. And from there into Rathdrum did you maintain about that speed or did you go faster or slower?

A. We went some of the distance slower and some faster.

Q. When you got to Rathdrum how long did you stop there?

A. About two minutes.

Q. What stop, if any, did you make from Rathdrum to Spokane?

A. U. P. crossing.

Q. Near Spokane?

A. Yes, sir.

Q. Now, from Rathdrum down until you began to slow up at that U. P. crossing state the condition, what kind of a gait you struck.

A. I think we came about sixty miles an hour.

369 Q. Did you stop or did you not, at the U. P. crossing?

A. I can't tell you whether we came to a dead stop or not, but we always make it a rule to stop there.

Q. Have you any recollection upon the subject?

A. No, I have not.

Q. From there into town what kind of a speed did you maintain?

A. We came about thirty to thirty-five miles an hour.

Q. And what distance did you use for slowing up for the station at Spokane?

A. Started in there somewhere about the round-house.

Q. How many trips before that had you made over that particular line?

A. I could not tell; a great many; I was doubling the road every day I think at that time, for nearly two and a half months.

Q. Doubling the road every day and making two trips a day over that line?

A. Yes, sir.

Q. I will ask you to state to the jury what the fact is as to whether the trip from Hope to Sandpoint was above or below or about the average of belated trains when you would pass over there?

A. About the same, I think.

Q. What is the fact as to whether you had passed faster west at different times?

A. I have, yes, sir.

Q. How much faster than that particular trip?

A. I could not say just how much faster. I believe we went from Spokane to Hope with the general manager's special in an hour and forty minutes.

370 Q. An hour and forty minutes?

A. Yes, sir.

Q. With the general manager's special?

A. Yes, sir.

Q. Who was with you at that time?

A. J. P. Fleming.

Q. And the general manager and his party in the car?

A. Yes, sir.

Q. That was an hour and forty minutes, which would be fifteen minutes less than the time occupied in this run?

A. Yes, sir.

Q. Now, in passing over this curved piece of road from Hope to Kootenai, passing a number of six-degree curves, I will ask you to state on that day what unusual motion you noticed in the engine or rolling or rocking or lurching of the engine.

A. I did not notice any.

Q. If there had been any such motion what was there to prevent your noticing it?

Mr. C. S. VOORHEES: I object to that character of question. He says he did not notice it and that is all there is to it.

(Objection overruled. Exception allowed.)

A. Nothing.

The COURT: State whether there was anything to prevent your noticing it if it had.

Mr. THOMPSON: He said nothing.

Q. What kind of an engine were you driving on that day?

A. Schenectady engine.

Q. Describe to the jury the character of engine, that is as to size and manner of working and etc.

371 A. It is a 20 x 26 inch stroke engine; I think the wheels are about five and one-half feet, something like that. I don't know just the dimensions of the wheel; two hundred pounds pressure and the class is class B.

Q. How is that engine as to having its center of gravity high or low on the track?

A. It is high.

Q. How does it compare in that respect with Baldwin engines?

A. It is some higher but I don't know just how much, quite considerable higher than the Baldwin engine.

Q. I will ask you to state if you know from traveling over that track the length of time that you did, what the character of that track was on the 13th day of November, 1898, as to being in good or bad condition, smooth or rough or what?

A. It was good.

Cross-examination.

(By Mr. R. H. VOORHEES:)

Q. What speed did you say you made to Oden from Pack river?

A. To Oden from Pack river about thirty to thirty-five miles an hour until we got nearly to Oden.

Q. Do you think it was thirty or thirty-five?

A. About along there; I did not state positively, but it was along in there.

Q. You are sure it was under thirty-five?

A. Yes, sir; I think it was under thirty-five until we got nearly to Oden.

Q. If your engineer thought it was thirty-five, would you say that your figure was as good as his?

372 A. Yes, I think so, yes, sir.

Q. And what speed did you start out of Hope at?

A. We started from a standstill to about thirty-five miles an hour I think until we shut off.

Q. Up to what point did you reach thirty-five miles an hour?

A. Between Pack River trestle and Hope.

Q. You don't know just where?

A. No, sir; I don't know just exactly where.

Q. And what was the highest speed you think you ran about the time you got to the trestle?

A. About thirty-five miles.

Q. Then what rate of speed was run at?

A. After that?
Q. Yes, sir; from the trestle, over the trestle.
A. When we shut off and rolled across the trestle I guess the speed decreased to about twenty-five miles an hour or something like that.
Q. Then what happened, at the west end of the trestle?
A. We began working steam then, from there on to Sandpoint.
Q. Before you got off the trestle?
A. Yes, sir.
Q. At what rate of speed were you running at when you passed this particular six-degree curve where the body was?
A. I think about thirty-five miles an hour.
Q. Thirty-five miles an hour?
A. Yes, sir.
Q. Certain of that?
A. I am pretty positive of it, yes, sir.
373 Q. There was nothing at that particular curve to call your attention to the particular speed being made at that particular point, was there, when you passed it?
A. Not necessarily, no, sir.
Q. Nothing at all, was there?
A. No, not that I could say there was, no.
Q. You did not know that Mr. Adams was going to fall off at that curve?
A. No, sir.
Q. Or had fallen off at that curve?
A. No, sir.
Q. But you are sure that you were making just thirty-five miles an hour at that particular curve?
A. I did not say just thirty-five miles an hour; I said I thought along in there somewhere; I could not say.
Q. About thirty-five miles?
A. Yes, sir.
Q. You are sure at that particular curve, anyhow?
A. No, sir; I am not sure at that particular curve.
Q. Then you think you were making perhaps some other rate of speed at that particular curve?
A. Might have been a little less and might have been a little more; I don't bind it to no certain limit at all.
Q. Did you reach this conclusion at that time, Mr. O'Neill, or have you made up your mind as to that since?
A. At that time, yes, sir.
Q. At that time when you were passing along there?
A. Yes, sir.
Q. Is it customary for you to fix in your mind the exact rate of speed that you are making at each mile of a run of eighty-five miles long?
A. Not exactly for each mile, no, sir.
374 Q. Do you remember the speed that you were making the day before when you were running over that road?
A. I think about the same.

Q. You think you ran it in the same time the day before?
A. Yes, sir.
Q. Were you thirty minutes late the day before?
A. I could not tell you.
Q. Then you really don't know what rate of speed you ran it in the day before, do you?
A. No, sir; I don't, but as a general rule we made it in along about twenty-five or thirty minutes.
Q. You made up time that day, didn't you?
A. Yes, sir.
Q. You made up time between Hope and Sandpoint, didn't you?
A. I could not say as to that, no, sir; I could not tell you that because I didn't know what the schedule time was.
Q. You didn't know anything about the schedule?
A. No, sir; I did not.
Q. You have no memory of that at all?
A. No, sir.
Q. You can't say what your schedule was to run then?
A. No, sir.
Q. You don't know whether you made up any time between Hope and Sandpoint or not over the ordinary schedule?
A. No, sir; not to tell you the truth.
375 Q. Nor can you tell whether you made it in the same time that you made it in the day before? Do you have any remembrance of the time that you made it in before?
A. No, sir; I don't.
Q. Nor the rate of speed that you ran any mile in the day before?
A. No, sir.
Q. What rate of speed did you cover that particular curve at the day before?
A. I thought along about the same; I did not notice anything unusual; it was the same engine.
Q. You think you made thirty-five miles an hour over that curve the day before?
A. Yes, sir; I do.
Q. Were you accustomed to making thirty-five miles an hour over that particular curve?
A. Yes, sir.
Q. According to your running at that time?
A. Yes, sir.
Q. So this was only your ordinary rate of speed established by the schedule?
A. Just about the same, yes, sir.
Q. Just about the same?
A. Yes, sir.
Q. Between Hope and Sandpoint?
A. Yes, sir.
Q. That you had been running when on time?
A. I think so, yes, sir.
Q. Just about as sure of that as you are of the character of speed made at this particular curve, you think?

A. I did not ju-t understand what you said then.

Q. You are as certain that you were running about the ordinary schedule time there as you are that you were making thirty-five miles at this particular curve?

A. Yes, sir.

376 Mr. THOMPSON: I object to counsel telling the witness to make a comparison between the certainty with which he testifies to different things.

(Objection overruled. Exception allowed.)

Q. Now, you have no remembrance of the way you ran over that road the day after this?

A. Yes, sir; I do.

Q. What time did you make that day?

A. I don't recollect the time, but I know that we were watching out for a man that we were told of that morning.

Q. You don't *d*emember the speed?

A. About the same, I think.

Q. You think you made the same speed. Were you late that day?

A. I could not tell you as to that.

Q. Why did you make the same speed if you were not late?

A. It is generally practical to make it about the same one day as another.

Q. Make the same speed whether you are late or not?

A. Yes, sir.

Q Didn't you make up some time on that day, the 13th of November?

A. I think we did, yes, sir.

Q. Then if you were not late the next day why should you make up time?

A. I don't know whether we were late the next day or not.

Q. Then you don't know what rate of speed you ran at the next day, do you?

A. I don't know exactly, no, sir.

377 Q. You haven't any remembrance of it at all, have you?

A. No, sir.

Q. But you are certain about all of these points you have specified as to the rate of speed that you passed them on this particular run the 13th of November?

A. Yes, sir.

Q. Now, at what rate of speed did you run through Oden?

A. About forty or forty-five or fifty miles an hour.

Q. You would not be sure as to whether it was forty or forty-five or fifty?

A. I am not positive; no, sir.

Q. Was it as much as fifty-five?

A. It may have been, yes; yes, sir.

Q. You say between forty and fifty-five?

A. About there.

Q. You could not say anywhere between forty and fifty-five could you?

A. I thought it was along about forty-five or fifty miles an hour, yes, sir.

Q. Did you make up your mind as to what the speed was at that time when you were passing Oden?

A. Yes, sir.

Q. What figure did you make it up at? Forty or fifty-five?

A. About forty-five or fifty miles an *hour I thought somewhere* along about there.

Q. You testified that you could estimate speed quite accurately, did you not?

A. A little that way; yes, sir.

378 Q. Well, within ten miles, you ought to fix it within ten miles, ought you not?

A. I think so; yes, sir.

Q. Did you?

A. I don't know; I told you what I thought it was.

Q. What was it you figured your rate at the time?

A. About forty-five or fifty miles an hour.

Q. Do you say it was not fifty-five?

A. I don't think it was, I am not positive, though.

Q. Will you swear it was fifty-five miles an hour, would you think that that was correct?

A. I suppose it would be; yes, sir.

Q. Your memory is not very exact at this time, is it?

A. I don't know; I don't think it was fifty-five miles an hour; I would not say for sure, through Oden.

Q. Now, Mr. O'Neill, starting at the nine-mile post from Oden, you say you went there forty-five or fifty miles an hour?

A. Yes, sir.

Q. Increasing, as I understood you?

A. Yes, sir.

Q. Passing the nine-mile post at what?

A. I don't know just exactly where the nine-mile post is. Is it east or west of Oden?

Q. You have run over the road a whole lot, haven't you?

A. Yes, sir.

Q. You couldn't say whether it was east or west of Oden now, the nine-mile post?

A. I think it just west of Oden.

Q. Then you do think you know where the nine-mile post is?

A. Yes, sir; I think so.

379 Q. West of Oden. Do you know how far west of Oden it is?

A. I think it is just a little west of the switch.

Q. Now, you were increasing speed there?

A. Yes, sir.

Q. How fast?

A. Well, it does not increase very fast there for a very little way west because it starts up grade.

Q. What speed had you reached at the bottom of that grade?

A. About fifty miles an hour.

Q. You went up that grade starting at fifty miles an hour. Where does the grade begin, how far from the nine-mile post?

A. I should think right about at the nine-mile post.

Q. Where does the grade end with reference to the ten-mile post?

A. I think right about the center of that curve, it would be the ten-mile post.

Q. Yes, sir; how long is the grade?

A. The grade is about a mile long.

Q. A mile long. You have been over it a number of times, haven't you?

A. Yes, sir.

Q. You are sure it is a mile long?

A. Just about a mile long, maybe a little more than a mile long.

Q. So that we start at the nine-mile post and stop at the ten-mile post?

A. Right at the mile post east of Kootenai is the top of the grade.

380 Q. At the mile post east of Kootenai?

A. Yes, sir; at the top of the grade.

Q. What mile post would that be?

A. I think the eleven-mile post.

Q. Then it would be more than a mile long, would it not, if it started say at the mile post?

A. It would be two miles, but there is some straight track in there; it would be two miles.

Q. It would be two miles then, you think?

A. Yes, sir.

Q. Then you ran up this grade. What speed were you at when you passed the ten-mile post?

A. About forty-five miles an hour.

Q. And when you got to the top of the hill?

A. Well, I thought you were figuring the top of the hill there as the ten-mile post.

Q. No, sir; the ten-mile post, if the grade is 2 miles long, is on the grade.

A. It would begin to decrease along in there somewhere.

Q. Then by the time that you got to the eleven-mile post on the top of the grade you were down to about forty-five miles an hour, you think?

A. Just about that.

Q. Slightly decreasing?

A. Yes, sir.

Q. You did not decrease and start up again on that grade, did you?

A. No, sir.

Q. Kept right along, but it decreased steadily until you got to the eleven-mile post at the top of the grade and there you were going forty-five miles an hour?

381 A. Yes, sir.

Q. Then you began at the top of the grade and increased speed?

A. Yes, sir.

Q. On the down-grade?

A. Yes, sir.

Q. From the top or eleventh-mile post, and what speed did you increase to?

A. About fifty or fifty-five miles an hour, I think.

Q. Did you pass Kootenai at that?

A. Yes, sir; about fifty miles an hour through Kootenai.

Q. Then you increased some?

A. Yes, sir.

Q. Up to what speed?

A. Maybe a little more than that, but I don't know as it was much more; I could not tell you, to tell the truth.

Q. You don't know whether you got any more than fifty or not?

A. No, sir; I was pretty busy about that time.

Q. Firing?

A. Yes, sir.

Q. And you did not run less than fifty until you began to slow up for Sandpoint?

A. I think not.

Q. Where did you slow up?

A. At the mile board, I believe.

Q. Fifteenth-mile post. There is a very little straight track in that run and a whole lot of curves, is there not, Mr. O'Neill?

A. From the ten?

Q. The whole run.

A. It is about divided up equally, about half, I think.

Q. Do you think so?

A. Yes, sir.

382 Q. Does it strike you there on the board as half of straight track?

A. Yes, sir.

Q. Between Hope and Sandpoint?

A. Yes, sir.

Q. You think your eye is as good for measuring straight track as your mind is for remembering rates of speed, the exact points?

A. I think so; yes, sir.

Q. You stated that you noticed no lurching or jarring in the engine at all. Would there be no tendency to swing to one side when an engine goes around a six-degree curve at thirty-five or forty miles an hour?

A. Yes, sir.

Q. There would be a tendency to swing to one side, would there not?

A. Yes, sir.

Q. You notice that as a uniform thing, don't you?

A. Yes, sir.

Q. If you were standing on the footboard between the engine and the fuel tank, the coal tank, you would feel the sway toward the side of the engine, would you not, if you went around a six-degree curve at thirty-five miles an hour?

A. Yes, sir.
Q. That would be increased at forty miles an hour, would it not?
A. Yes, it might, yes.
Q. And more at forty-five?
A. Yes.
Q. And still more at fifty, would it not?
A. Yes, it would have a tendency to.
Q. The higher the speed the greater the swaying out to one side as the engine goes around a curve, would it not?
A. Yes, sir; to a certain extent.
383 Q. So, when you say you did not notice any jar or jolt in the engine, you did not mean to say that there was not any tendency to swing out?
A. No, sir.
Q. When the engine took the curve?
A. No, sir.
Q. That was pronounced even in the engine?
A. Yes, sir.

(Excused.)
(Whereupon an adjournment was had until 7:45 p. m., to-day.)

SAMUEL LONG, testified as follows:

Direct examination.

(By Mr. THOMPSON:)

Q. Your name is Samuel Long?
A. Yes, sir.
Q. What is your occupation?
A. Passenger conductor.
Q. How long have you been a passenger conductor?
A. Over six years.
Q. What other line of railway service did you perform prior to becoming a passenger conductor?
A. I have been in the train service, freight brakeman and freight conductor some years.
Q. How long have you been in railway service?
A. About twenty-two years.
Q. What railway companies have you served?
A. C. B. & Q.
Q. Chicago, Burlington and Quincy?
A. Chicago, Burlington & Quincy, Missouri, Kansas and Texas, Oregon Short Line and Northern Pacific.
384 Q. How long have you been in the service of the Northern Pacific?
A. Since June, 1889.
Q. What train were you conductor of on the 13th day of November, 1898?
A. Train No. 1.

Q. What time did that train leave Hope, Idaho, if you recall?
A. At 4:15.
Q. What is the fact as to whether you actually came into Hope on that train or took your place as conductor at Hope?
A. I came into Hope on that train.
Q. From where?
A. Helena, Montana.
Q. As conductor or what?
A. As conductor.
Q. How far did your run extend from Helena, to what point?
A. From Helena to Spokane.
Q. Do you recall what time you arrived in Hope?
A. I have a record.
Q. You may refresh your recollection, if you can; at last, speak from your memory.
A. (Referring to memorandum.) At 5:10 p. m., Rocky Mountain time, or mountain time.
Q. What time did you leave Hope, you say?
A. 4:15 p. m., Pacific time.

(By Mr. C. S. VOORHEES:)

Q. When did you make that record?
A. At the time I left Hope.
Q. In that book?
A. Yes, sir.
Q. Made at the time?
A. Yes, sir.

(By Mr. THOMPSON, resumed:)

Q. State what is the fact, Mr. Long, as to whether it is a
385 part of your duty in actual practice to always make a record when you started from a station with a belated train.
A. At that time it was; I made it a practice as a rule, I made a practice of keeping the departure time and arriving time at Hope also here.
Q. Why at Hope more than at any other station between there and Spokane?
A. The reason of that is that we run on two divisions under two different superintendents, and in doing that if there were any delays on the road it would have to be reported to either one of the division superintendents; I would know how much time was lost and keeping an accurate record to go by.
Q. When you left Hope, Idaho, what sort of a train did you have, number of cars and how situated in the train?
A. Had eight cars.
Q. What was the number of the engine that you had?
A. 220.
Q. Who was the engineer in charge of that engine?
A. Mr. Matheson.
Q. Who was the fireman for him?
A. O'Neill.

Q. And what were the names of your brakemen?
A. O. M. Lawrence and J. A. Adams.
Q. Who was the front brakeman?
A. Adams.
Q. And who the rear brakeman?
A. Lawrence.
Q. Do you know where Mr. Matheson, the engineer, now is?
A. Spokane.
Q. Do you know whether he is here in attendance or not on this trial?
386 A. He has been up until yesterday; I have not seen him to-day.
Q. Do you know where the fireman is who was with him?
A. He is here.
Q. Do you know where Mr. Adams, the front brakeman, is?
A. I do not.
Q. Do you know where he went, if anywhere, some months before the former trial of this case?
A. He went to Cape Nome some time last spring, but what time he went I don't know.

Mr. R. H. VOORHEES: It is immaterial where he went.

Q. Do you know where the other brakeman, Mr. Lawrence, is?
A. He is here in attendance.
Q. What was the first car next to the engine when you pulled out from Hope?
A. The mail-car.
Q. What was the next car?
A. Baggage-car.
Q. And the next?
A. Express.
Q. And the next?
A. Smoking-car.
Q. And the next?
A. Day-coach.
Q. And the next?
A. Tourist.
Q. What followed it?
A. Diner.
Q. And what following that?
A. A sleeper.
Q. Any other cars?
A. No, sir.
Q. From the time you left Hope until you reached Spokane what change, if any, was made in the character of the train, or the location of the cars therein?
A. None at all.
Q. When you left Hope station at 4:15, as you state, what
387 is the fact as to whether it was daylight, dusk, or dark?
A. It was daylight.
Q. Leaving for Spokane, can you give the jury a tracing of what

you did in your train immediately upon leaving and on until you reached Sandpoint, what was the first thing you did before the train started, first, before the train started what did you do, if anything, as to noting the time with the engineer or any formalities of that kind?

A. Well, sir, I went over to the engine, the engineer, rather; the engineer was there on the engine and I compared time with him.

Q. Why did you do that?

A. That is customary; we are required to do that.

Q. Part of your regular duties. Compared your time with each other?

A. Yes, sir.

Q. What was the fact as to whether they agreed or did not agree on the time?

A. We were agreed within a few seconds.

Q. What time was it when you compared your watches?

A. To the best of my recollection it was about one minute before we started, about 4:14.

Q. What did you do immediately upon comparing watches?

A. I went back a few feet and hollered, "All aboard," and started the train, gave the signal to start, rather.

Q. Which car did you get onto?

A. Onto the head end of the smoking-car.

388 Q. What duty did you proceed to perform as the train pulled westward?

A. I rode there on the platform.

Q. On the platform of the smoker, the front platform?

A. The front platform, until the train attained a speed at which no passengers or anything of that kind would get on.

Q. Is that an ordinary practice or was it something peculiar on that day?

A. No, I always make it a rule to do that.

Q. After the train attained such speed that you thought no one would try to get aboard what did you do?

A. I started back and collected the transportation.

Q. Where did you begin collecting transportation?

A. In the forward end of the smoking-car.

Q. What is the fact as to whether you had a number of passengers or only a few to collect from?

A. There were several, not very many. Of course, I had examined the transportation of all the passengers before; all the transportation I had to get was from passengers that got on there; probably there might have been four or five at the outside.

Q. Were you acquainted at that time with Mr. Jay H. Adams?

A. No, sir.

Q. Were you acquainted with Mr. George Gabbart?

A. No, sir.

Q. Have you seen Mr. George Gabbart during the progress of these trials?

A. Yes, sir.

Q. I will ask you to state to the jury after having seen him
389 now, and know who he is, what the fact is as to whether or not you saw him on that particular train on that day.

A. Yes, sir, he was on.

Q. Where was he located?

A. In the forward end of the smoker.

Q. Who, if anyone, was with Mr. Gabbart at that time?

A. There was a man with him who, to the best of my knowledge, was Mr. Adams.

Q. Why do you say to the best of your knowledge, what makes you think he was Mr. Adams?

A. From the description that I have had of the gentleman.

Q What kind of a looking gentleman was the gentleman that was with Mr. Gabbart?

A. He was a heavy-set gentleman, I should think about fifty years old, red face, smooth shaven, and probably about five feet, six or seven inches tall.

Q. Do you recall how he was dressed, what kind of a hat he had on?

A. He had on a stiff hat; that is, one of those derby hats, and rather a large shape and apparently a new hat.

Q. What, if anything, did you notice as to whether he had on an overcoat or not?

A. I don't think he had an overcoat on; I recollect his having on a dark suit of clothes.

Q. What did you do with reference to taking up the transportation of Mr. Gabbart and this gentleman, Mr. Adams, if it was Mr. Adams?

A. Mr. Gabbart's transportation was the return portion of
390 a round-trip ticket I think—it is termed a round-trip red excursion, and the other gentleman who was with him, whom I suppose was Mr. Adams, handed me an annual pass.

Q. Do you know what the number of that annual pass was?

A. I have the record of it.

Q. Did you make the record of it at the time?

A. Yes, sir.

Q. What reason or requirement was there for you to make such a record?

A. We are required——

Mr. C. S. VOORHEES: I object to that as immaterial, incompetent and irrelevant.

Q. I will ask if you remember what the number was?

Mr. R. H. VOORHEES: I move to strike out the testimony regarding the pass as also incompetent and immaterial.

(Motion denied. Exception allowed.)

Q. When you had examined their transportation and taken up the ticket of Mr. Gabbart—or did you take up the ticket or not of Mr. Gabbart; what is the fact about it, the return ticket?

A. To the best of my recollection I took it up.

Q. What did you do, whether you took up the pass or not?

A. No, just took the number of it and returned it to him.

Q. Was there any conversation or anything took place between you three gentlemen while there?

A. No, sir.

391 Q. What did you do thereafter?

A. I put hat checks in their hats and proceeded on towards the rear end of the train, to take the rest of the transportation, the tickets.

Q. What do you recall, if anything, of the gentleman, Mr. Jeannot, that testified here?

A. Mr. Jeannot was on the train and what car he was in, or where, I don't recollect; it seems to me that he was in the rear end, rear portion, of one of these cars, but whether it was in the rear coach or smoker, I cannot say.

Q. What do you recall, if anything, of any elk head that he had with him?

A. No, sir.

Q. No recollection in any way with reference to the elk head that he had with him?

A. No, sir.

Q. What conversation did you have or controversy with Mr. Jeannot in any way?

A. None that I recollect of.

Q. When you passed out through the smoking-car, having discharged your duty therein, what car did you then go into?

A. Into the day-coach.

Q. And what did you do, if anything, in going down through the day-coach?

A. I collected what transportation there was, or examined the transportation of those that got on at Hope.

Q. When you got through the day-coach what next car did you go into?

A. Through the tourist-car.

Q. What is the fact as to whether or not that tourist-car was a vestibuled car, or otherwise?

A. It was not a vestibuled car.

392 Q. What had been the practice at the time in the trains that passed over the Northern Pacific railroad from Helena to Spokane of carrying one or more of these tourist sleepers?

A. It was rulable to carry from one or more, sometimes three.

Q. What I want to find out is whether they had actually been carried on every train, every passenger?

A. Yes, sir, every train.

Q. How long had that been going on?

A. It had been going on ever since I had been running the trains as conductor.

Q. What do you know, if anything, as to whether you had or had not ever seen this gentleman, which you say you now suppose was probably Mr. Adams, upon the trains of the Northern Pacific before that?

A. I can't say that I ever saw him before.

Q. What, if anything, do you know as to whether any of those tourist sleepers that you speak of had ever been carried over the road in which trains were or were not vestibuled?

A. I never saw one vestibuled up until that time.

Q. In going into that tourist sleeper you passed over the unvestibuled front platform, did you?

A. Yes, sir.

Q. What did you do in that car, whether you had any passengers in that car that you had to look after?

A. To the best of my knowledge there was nobody took the sleeper there—took the tourist.

393 Q. Nobody at Hope. When you got back to the rear of the tourist sleeper what did you do, whether you stopped or continued on?

A. I continued on.

Q. Through what car?

A. Dining-car.

Q. What persons, if any, passengers, did you find in the dining-car?

A. None to my recollection.

Q. Where did you go to from the dining-car?

A. Into the standard sleeper.

Q. And what service, if any, did you perform there?

A. I don't recollect; I don't think there was anyone got on; I don't think there was.

Q. Where did you go after you passed to the rear of the standard sleeper or Pullman?

A. I started back to the head end of the train, that is over to the smoking-car.

Q. Where were you on your passage through this train, or where were you located at the time you passed over the Pack River trestle, if you know?

A. In passing over the Pack River trestle?

Q. While you were passing over the Pack River trestle?

A. Yes, I would be in the tourist-car walking through—now, probably I might walk through beyond the dining-car and the tourist at that time.

Q. But you were in the tourist or going into the dining-car at the time you passed over the Pack River trestle?

A. No, I was coming back from the rear end; I was walking right straight through, straight along, and probably while the train

394 was on the bridge I would be in the dining-car and so passed into the tourist-car, and at the time that it left the end of the trestle I was then proceeding into the rear end of the day-coach.

Q. What recollection have you, if any, of passing off the westerly end of the Pack River trestle and striking the curve there, whether you do recollect it or not?

A. I don't recollect anything about the curve.

Q. Where did you go then after passing out of the dining-car and into the tourist-car on your way forward?

A. I went, as near as I can recollect, the best of my memory, the first stop I made was in the day-coach.

Q. What caused that pause, if you know?

A. A passenger sitting on the north side of the coach in the seats and they were looking at the lake just about the time we came off the trestle; it might have been a little bit this side, or probably might have been on the trestle, I would not say, but then it was right near there.

Q. Do you know who that passenger was?

A. I do not.

Q. And why did it attract your attention there looking out over that lake or what did you do?

A. They asked me what the name of the lake was, and I told them, and also looked out, and the waves were whitecaps, as we would call them, were rolling pretty high.

Q. What was causing that, if you know?

A. I suppose it was the wind; I don't know anything else.

Q. What did you note, if anything, of the wind as you passed out over the open platform of the tourist-car?

395 A. I have no remembrance of that at all; I don't know whether it blew or not.

Q. Did you continue on or did you stop for those passengers then?

A. Just for that length of time, probably a half a minute or something like that, explained to them the name of the lake and looked at the water roll and passed on over into the smoker.

Q. Now, on your passage from the dining-car forward over the end of the Pack River trestle and on into the tourist-car and on into the day-coach, state whether or not you met this short heavy set gentleman that you spoke of, or any passenger coming down the aisles or on the platforms?

A. I could not say, because I am facing them at that time.

Q. You have no recollection of that one way or the other?

A. No, sir, there would be nothing unusual. He might have gone there and might not; there might have been twenty of them.

Mr. C. S. VOORHEES: Talk louder.

A. (continued). I say there would be nothing unusual for the passengers passing back to the diner or the rear end of the train back and forth; if I did meet them I would pay no attention to them; it would be nothing unusual, therefore I have nothing to make me remember it.

Q. And you actually have no memory upon the question at all?

A. No, sir.

396 Q. What person, if any passenger, did you see in the dining-car, if you have any recollection?

A. I have no recollection.

Q. Do you have any recollection of seeing any of the dining-car force, dining-car conductor or anybody of that sort?

A. I recollect about the waiters getting the tables set up and getting them ready to serve dinner.

Q. Do you have any recollection as to where the dining-car conductor was at that time?

A. No, I have not. I have got no recollection.

Q. When you passed on through, did you go forward through the tourist sleeper?

A. Yes, sir.

Q. And where to?

A. Clear over to the smoking-car.

Q. To what part of the smoking-car?

A. Universally, I went to the head end of it before I got to Sandpoint, but how long it took me to go there, or what duties I performed before I reached the head end of the smoking-car I have no recollection.

Q. Mr. Long, what was there unusual or to attract your attention in any way in the speed or motion of the train between Hope and the eighth mile post—we will say beyond Pack River trestle?

A. Nothing unusual.

Q. What was there in the lurching or swinging of the train to attract your attention?

A. I have no remembrance of any extraordinary lurching or anything of that kind.

397 Q. How often did you pass over that piece of track in running your trains during the course of a month—did you make daily, weekly, or semi-weekly trips?

A. I would make a round trip every four days.

Q. That would be one trip every two days?

A. Yes, sir; I would go one way or the other every two days.

Q. Over that same piece of track?

A. Yes, sir.

Q. Now, what was there in any way either in the lurching of the train, or in the noticeable speed, or in the wind when you would pass out between the cars or in any direction that attracted your attention to anything unusual about the moving of the train?

A. That is as far as the eight-mile post?

Q. Yes, sir.

A. No, sir. I don't recollect anything unusual.

Q. What is the fact as to whether or not from the experience that you had had as conductor in railroading and noting the passage of trains whether you could or could not tell about the speed of the train when you were riding upon it?

A. Yes, sir. I could tell pretty close; of course not accurate.

Q. About how close as to the miles per hour.

A. It depends upon the rate of speed they are running.

Q. Well, say, a rate of speed from thirty-five miles up to sixty miles an hour, how close could you ordinarily judge of the rate of speed?

A. I think I could judge within about five or six miles of it.

398 Q. What rate of speed would you say that you passed from Hope, Idaho, to the eight-mile post west of Pack river?

A. To the best of my recollection, I don't think that we exceeded forty miles an hour at any point.

Q. What rate of speed did you make in passing over the Pack River trestle as near as you can judge of it?

A. I could not say because I was walking through there, and it was slower there than it was at other points because they always slow down there, slow over the bridge, over part of the bridge, slow down.

Q. What rate of speed did you make after passing the curves at the eight-mile post on towards Kootenai whether you increased it or diminished it, in your judgment?

A. The train had increased speed down through Kootenai, and from there into Sandpoint, I recollect well that we made fast time.

Q. From Kootenai to Sandpoint?

A. Yes, sir.

Q. What kind of a roadway is that?

A. From Kootenai to Sandpoint is comparatively a straight line.

Q. And what is the grade, whether level or gradual descent towards Sandpoint?

A. To the best of my judgment it is a little bit descending toward Sandpoint.

Q. And what is your recollection as to the rate of speed attained between Kootenai and Sandpoint?

A. I should think, the best I can judge, he must have made fifty miles an hour in there on that and probably a shade over, probably a little better than that.

399 Q. What is the fact after passing Sandpoint? You recollect reaching Sandpoint?

A. Yes, sir.

Q. What did you do as to stopping there?

A. We stopped at Sandpoint, I should judge, as near as I can recollect now, about a minute.

Q. What is the fact as to whether it was dark or light when you reached Sandpoint?

A. It just began to get dusk. The reason I remember is, I did not have to use any lantern.

Q. You did not have to use any lantern. When you say you did not have to use any lantern, what would you have to use a lantern for?

A. A man in working a train or who has anything to do with a railway train, such as brakeman or conductor, might as well be a wooden man as to be without it; he needs it to give his signals.

Q. Speak louder.

A. Take a conductor or brakeman, he would be no good without a lantern. He has got to have it. It is a part of his tools. He has got to have it to make signals, and to see what he is doing.

Q. In starting your train at Sandpoint who had to give the signal to the engineer to start?

A. I did.

Q. How far were you from the engineer when you gave your signal?

A. I stood beside the baggage-car; I probably was one hundred feet west of Sandpoint at the time.

Q. How was that signal given?

A. We generally hold our hand up and give a signal to go.

400 Q. Now, you may state to the jury whether there was light enough for all purposes when you reached Sandpoint?

A. Yes, sir.

Q. What is the fact as to whether the speed was decreased or increased from there on?

A. Well, until after leaving, passing the trestle—there is a long trestle on this side of Sandpoint. I think it is about a mile and a half long.

Q. When you say "on this side" you mean west of Sandpoint.

A. West of Sandpoint. You start out of Sandpoint and then for four or five hundred feet there is a little trestle then—it is quite a long trestle too—and then there is part of that that is filled in, then comes the trestle over the main river, the lake.

Q. That is crossing the outlet of Pend d'Oreille lake?

A. Yes, sir.

(Cross:)

Q. Is that at Sandpoint?

A. This is at Sandpoint.

Q. How long is that trestle over the outlet of the Pend d'Oreille lake?

A. I don't know, but I should judge it was close on to a mile.

Q. What was the fact as to whether the speed was lessened or increased going over that trestle?

A. It maintained about the same rate of speed, that is, after he got the train under motion, probably had it going, I don't think to exceed twenty-five miles an hour, and just let them run along at that rate of speed over the bridge, and after leaving the bridge,

401 he made very fast time from there to—in fact all the way through to Spokane.

Q. When you got to Athol what did you do as to stopping or running through?

A. We went right through Athol, did not stop.

Q. At what rate of speed?

A. I don't think he ever got below forty or forty-five miles an hour through there.

Q. And what did you do at Rathdrum, whether you stopped or not?

A. We made a station stop there.

Q. Anything else except a station stop?

A. No, sir.

Q. How long did you stop there at Rathdrum?

A. Between a minute and a minute and a half about.

Q. What is the condition of the track as to being straight or crooked from Athol all the way to Spokane?

A. From Athol to Spokane it is a comparatively straight track, with slight curves.

Q. What was the condition of the track at that time as to being good or bad, smooth or rough?

A. We always term it as good track.

Q. What did the engineer do as to maintaining a high or low rate of speed from Rathdrum to Spokane?

A. Ran at a high rate of speed.

Q. After leaving Rathdrum what stop, if any, did you make before getting into Spokane?

A. Stopped out here—I won't say that we stopped, but he slowed up for the O. R. & N. crossing out here just east of Spokane.

402 Q. Is there any telegraph station there?

A. No, sir.

Q. You don't know whether he actually came to a full stop or only slowed up?

A. To the best of my knowledge he did not come to a dead stop, but he got it under control so that he would stop if he had to; that is the best of my recollection.

Q. When you speak of his having it under control, what rate of speed would you say the slowest rate of speed reached there was?

A. Six or eight miles an hour, so that anyone could get off.

Q. Then what was the fact as to whether the speed was increased after crossing there, from there into Spokane station, or what rate of speed was maintained through the city?

A. He made pretty good time until he got down here inside the yards.

Q. When you say "pretty good time" tell the jury what you mean. Whether ten, twenty, forty, or sixty miles an hour.

A. I should judge about thirty miles an hour, between twenty-five and thirty.

Q. And until he got down how far from the station?

A. Before it crossed the—I don't know the name of the street.

Q. About how far away, a quarter, half or a mile or whatever it was?

A. About a quarter.

Q. And from that into the station what did he do as to slowing up or otherwise?

403 A. He slowed up to make a stop for the station.

Q. Do you know of your own knowledge now what length of time was occupied in running from Hope, Idaho, to the stop at Spokane, the station, from starting at Hope to stopping at Spokane?

A. It would be an hour and fifty-five minutes.

Q. Mr. Long, in passing over that line of road did you become familiar with the situation of Lake Pend d'Oreille and the shore line thereof with reference to the railway track at and down all the way from Pack River section-house for two miles or more?

A. In which direction?

Q. Coming west, say from the end of Pack River trestle for two or three miles from the end of the trestle did you become familiar with how the line was located with reference to the lake?

A. Yes, sir.

Q. Tell the jury how it is situated with reference to the lake there?

A. It is right along the edge of the lake, the shore of the lake.

Q. And at that time, on the 13th day of November, 1898, how far was the railroad line from the lake shore?

A. You mean, as I understand you, from the water?

Q. Yes, the water itself, say from the westerly end of Pack River station around those curves, clear around this big curve up there, how near was the water of the lake shore as a rule to the track at that time?

A. It varies.

Q. I know, but on that evening, that 13th day of November—you mean in different places it is different distances?

404 A. Yes, sir, different points it varies from the track, but I don't think there was any place along there at that time where the water was over—well, I will put it all the way from one hundred and fifty feet from the track.

Q. Did you afterwards have your attention pointed out to the place where it was supposed Mr. Adams' body was found?

A. Yes, sir.

Q. I will ask you if you can state to the jury where that place was that was pointed out to you, whether on a straight line or on a curve?

A. It was just at the commencement of a curve.

Q. And about how far west from Pack River station?

A. Well, something over a mile, but I don't know the exact distance.

Q. Now, how far was the lake shore from the track at that point?

A. To the best of my recollection, it would be about in the neighborhood of one hundred feet.

(Cross:)

Q. What point was that?

A. The point where it was supposed his body was found, as it was pointed out to me.

(Direct resumed:)

Q. What has been the fact as to the rise and fall of the level of that lake every year from one season to another, whether the lake level remains the same or rises and falls?

A. It rises and falls; of course some years it rises more than others.

Q. How high is that Pack River trestle above the lake at low water, ordinary low water?

A. About thirty feet.

405 Q. What do you know, if anything, as to how high the water rises on that trestle?

A. In 1889 I understand it came up to the top of it.

Q. And how near to the top of it have you seen the water?

A. Within eight or ten feet of it.

Q. What do you know as a matter of fact as to whether the water did or did not in the next spring and summer after Mr. Adams' death come up to the railroad track, and if so, how high at that point where his body was supposed to have been found?

A. I could not say how high it did come up there.

Q. Do you recollect as a matter of fact there was high water the next season?

A. The lake did not get so very high that next season.

Q. It did not get over the track at any rate?

A. No, sir.

Q. What do you know as to whether it has been over the track there or not at different seasons?

Mr. C. S. VOORHEES: I object to that.

(Objection sustained.)

Q. I believe you stated, I am not sure about it, I believe you stated—what is the fact as to whether you had or had not been running continuously over the line from Hope to Spokane every second day during the whole of the latter part, say of August, September, October and November of the year 1898, or whether you had been off duty or not?

A. No, sir, I worked steady.

Q. Now, at that time, what was the fact as to whether the trains were always on time before this particular train; was this an exception, or were they frequently late about that time, or what is the fact?

406 A. They were frequently late.

Q. On those occasions when the train was late state what the fact is as to whether you ran by telegraphic orders or ran on the schedule.

A. As a rule we ran on telegraphic orders.

(The court admonished the jury and took a recess until 1:45 o'clock, p. m.)

TUESDAY, *December* 4, 1900—1:45 p. m.

Mr. LONG, on the witness stand.

The COURT: Are you through the examination in chief?

Mr. THOMPSON: Yes, sir.

Cross-examination.

(By Mr. R. H. VOORHEES:)

Q. Mr. Long, how long have you been running over that part of the road?

A. You mean up to the present time, or up until that time?

Q. Up until that time.

A. I don't know exactly, but to the best of my memory, if I remember, in the neighborhood of about three months.

Q. The train that you ran, was the make-up of it customarily as you have described it?

A. Yes, sir.

Q. Sleeper customarily in the rear?

A. Yes, sir.

Q. The diner customarily next to that?

A. Yes, sir.

407 Q. Tourist-car customarily next to that?

A. Yes, sir.

Q. And the day-coach next to that?

A. Yes.

Q. And the smoker?

A. Yes.

Q. And then came the baggage, mail and express?

A. Then came express, baggage, mail.

Q. Express, baggage and mail. That order seldom varied?

A. Very seldom.

Q. Very seldom. Where did the train come from, Mr. Long? You saw the transportation card in the sleeper, I suppose.

A. I don't know where it had come from.

Q. Do you know where it started from?

A. No, sir.

Q. Did you ever see the folders?

A. Yes, sir.

Q. Don't it tell where those through trains come from in those folders?

A. Not necessarily.

Q. But does it? I don't ask you if it necessarily does, but does it?

A. I couldn't say as to that.

Q. And you were never able to acquire the knowledge of where that train came from, were you, running for three months?

A. I never had occasion to ask.

Q. Well, you never knew; it never came to you from the transportation, the tickets in the through car? You knew it was a through train, didn't you, Mr. Long?

A. I knew it was supposed to be a through train.

Q. Ah, supposed to be. That was your supposition, was it?

A. That was my supposition, yes, sir.

Q. You are just leaving a little leeway for the possibility of the information that has come to you being inaccurate?

408 Mr. THOMPSON: If your honor please, I have not objected so far during the whole of this examination, but I do object now to the character of the examination, and ask your honor to limit it. This witness works upon a certain part of a road; he can only know anything by hearsay, regarding what he is now asked; and he is not permitted to testify from hearsay; and I think the examination is unjust to this, as any other witness.

Mr. R. H. VOORHEES: I think it is competent to test his knowledge on the subject.

The COURT: I sustain the objection to this particular question; he could not know except by hearsay, and not of his own knowledge.

Q. How did you acquire your supposition that that was a through train, Mr. Long?

A. Well, by—it is a general supposition—you asked me how I acquired it, it is that I always understood—that is my belief rather,

that these trains started from St. Paul; but whether this one did or not I don't know. I have no way of knowing; I did not ask anybody, or hear anybody say where it started from.

Q. Then, generally you will go so far as to say that generally those through trains started from St. Paul?

A. I don't say that they started from there; that was my impression that they started from there.

Q. Your impression is that they generally started from St. Paul?

A. Yes, sir.

Q. And when they caught up with you at Helena, they were in in this condition that you have described them to be in?

A. Yes, sir.

409 Q. Any idea, Mr. Long, how long those particular tourist-cars, or those tourist-cars that were run in those trains had been owned by the company?

A. I don't know who owned them.

Q. Now, Mr. Long, there is a cooking range in those tourist-cars, isn't there or is there?

A. Yes, sir; in the majority of them, that is, one that was fully equipped, would have a cooking range in it.

Q. That was the general character of those cars?

A. Yes, sir.

Q. You think it was on that car on that day?

A. Well, I am pretty sure that it was; if it had not been there I would have noticed it, but as I did not, the conclusion is it was there, to the best of my belief.

Q. Now, Mr. Long, you testified in answer to Mr. Thompson's question that the passing of people by you while you were moving through the trains would not attract your attention?

A. Well, I don't understand that question, whether you mean passing or meeting.

Q. Either?

A. Well, I would, more so notice, that is if anyone passed me as I walked by, and crowded by me, and went on by me I would notice that probably at the time; I probably would not remember it, but I would notice it; and if I met anyone going this way I would step to one side and let them pass on, and would not think anything about it at all. But if I was busy working my train and someone crowded by me, the chances are at the time I would notice it; I would think he was out of his place, and probably keep him back where he belonged.

410 Q. You mean that anybody coming? You mean that in coming back to the front, if anybody passed you you would not notice it?

A. No, sir; not nearly so much as if he passed me, making better time than I was, and trying to get around and ahead of me to go on through the aisle the chances are I would notice him.

Q. I will ask you, Mr. Long, if in the former trial of the case you did not testify to this effect: Question: "Now, Mr. Long, the fact is that conductors when they are taking up a fare here and there, and along through the car, from this side to that side, had their atten-

tion absorbed by collecting the fare, and anybody may pass them from behind without attracting their attention?" Answer: "No, sir, not with me. I don't know about other people." Question: "Would they necessarily attract your attention?" Answer: "Yes, sir." That is correct?

A. That is just what I stated now.

Q. Yes, sir, that is what you state now.

A. Yes, sir.

Q. Now, "Would you know the character of the person, and the person who passed you by?" Answer: "Well, I would know whether I had lifted his transportation or not." That is also correct?

A. Yes, as a rule it would be.

Q. Yes, sir. Now, Mr. Long, would not the lifting of the transportation still interest you if you met the party face to face?

A. No, sir; simply because the majority of people on a
411 train, unless I am well acquainted with them, if they are going any distance I put a hat check on them, in their hat. And if I met them face to face the hat check shows up. And if a man should pass me, I look up and I see his hat on the rear and the consequence is I don't know whether I have got his transportation or not, I don't see him in the face, and therefore, it would naturally call my attention to the fact, to look at him more closely than if I met him face to face.

Q. Then, Mr. Long, if a strong, heavy, wide man of about two hundred pounds, say, should pass you in the aisle, and you should meet him face to face, it would necessitate somebody getting out of the way, wouldn't it?

A. Yes, sir.

Q. You would either have to step aside or he would. Which would, under those circumstances, do you think?

A. Well, I would, as a rule, because I always show them that much courtesy, and I always step out to one side.

Q. I would expect it of you.

A. Yes, sir; it is expected to a certain extent.

Q. Now, Mr. Long, in meeting such person, a marked man like that, face to face, and having to step out of the aisle in order to allow him to pass, do you, or don't you think that that would leave some impression on your mind?

A. Well, I don't hardly know as it would.

Q. Then you think that Mr. Adams may have passed you there in that car without leaving any impression at all?

A. Yes, sir.

Q. It is the general habit of your mind in running that train to keep track of your passengers and the transportation question?

412 A. Certainly, that is what I am on there for.

Q. That is what you are on there for, and that is continually on your mind?

A. Yes, sir.

Q. That would be carried in your mind pretty near all of the time, wouldn't it?

A. To a great extent.

Q. Whether you had caught up with people, or people were getting out of the way of paying transportation. You do remember Mr. Adams distinctly when you saw him in the front of the smoker?

A. Yes, sir.

Q. Or at least a gentleman that corresponds with the description?

A. Yes, a gentleman that corresponds with the description.

Q. Yes, sir. Noticed the clothing and the face and the hat?

A. Yes, sir.

Q. You said that he had no overcoat; did you mean by that that he had no overcoat on, or no overcoat with him?

A. Well, if I said he had no overcoat it is a mistake, because I don't know whether he had an overcoat or not, and if he had one I don't remember of seeing it, or did not examine that close to have any remembrance whether he had no overcoat or not with him; he might have had it and he might not.

Q. You don't say then that he had no overcoat?

A. No, sir.

Q. Now, Mr. Long, you say that it was daylight when you left Hope?

A. Yes, sir.

Q. Wasn't it getting dusk, the sun sinking?

A. Yes, sir, it was getting along that time of the evening.

413 Q. Just along verging on the quick disappearance of the light in the winter time?

A. At the same time it was good daylight, and probably was daylight so that you could see the length of the train, and see four or five hundred feet distinctly for—well, I would say for thirty-five or forty minutes after that, and maybe longer.

Q. Were your lamps lighted?

A. Leaving there?

Q. Leaving for the west?

A. No, I think they started to light those lights afterwards; whether those lights were lit or not I cannot say; because sometimes the brakeman will light them up sometimes an hour before the time we need them, light them and let them burn low, and then when it becomes dark they turn them up.

Q. You have no remembrance of the lights?

A. I have no remembrance of those lights at all.

Q. Could not say one way or the other?

A. Could not say one way or the other.

Q. What I want to know is the impressions you acquired at the time. Now, Mr. Long, you say that you started in at the front end of the smoker and took up fares from there towards the rear of the train?

A. Yes, sir.

Q. Do you remember the number of fares in the smoker?

A. No, sir, I do not.

Q. About? Many or few.

A. Well, what we would term as few would be in the neighbor-

hood of three or four; to the best of my recollection; of course, I don't recollect definitely.

414 Q. And the train was in the yard at the time you started?

A. Yes, sir, it was in the yard, that is at the west end of the yard.

Q. Going about how fast?

A. I guess about fifteen miles an hour, maybe, along there, maybe a little faster than that; but I should judge about fifteen.

Q. And you went through the smoker and then through the day-coach taking up the fares?

A. Yes, sir.

Q. Then into the diner?

A. Yes, sir.

Q. Nobody in the diner, that is, no passengers?

A. I went into the tourist-car before I went into the diner.

Q. The tourist-car; I omitted that. Any fares in the tourist-car?

A. I don't remember.

Q. Any in the diner?

A. I don't remember; to the best of my judgment not; however, there could have been.

Q. And did you find any in the sleeper?

A. I think not; I don't recollect of any; and the best of my belief is that after I passed the day-coach I did not collect any more; I probably may have got one back in the sleeper; I don't recollect, but I don't think I did.

Q. Now, you returned then through the sleeper, diner, and where was the train when you got into the tourist-car.

A. On what part of the road?

Q. Yes, sir.

415 A. To the best of my belief it would be about on Pack River trestle.

Q. Then you went through there into the day-coach?

A. Yes, sir.

Q. And when you were in the day-coach where was the train?

A. Well, it was either on the west end of the trestle when I first stepped into the coach—it would be either on the west end of the trestle, or just immediately off of it.

Q. Well, you testified that when you were in the day-coach you were a little bit off of the trestle, beyond.

A. Well, probably I was, I would not be sure, I don't know exactly to a few feet, but I was close to it.

Q. Four hundred or five hundred feet, you think?

A. No, I don't think it was that far.

Q. Then you looked out of the window in the day-coach, as I understood you?

A. Yes, sir.

Q. You then were off the trestle, were you not?

A. The best of my belief I was off the trestle, because I can see it now in my mind as the waves were rolling up on the lake it would be on this side.

Q. On the shore?

A. Yes, sir.

Q. And then you went on into the smoker?

A. Yes, sir.

Q. Whereabouts in the smoker did you go?

A. Well, I don't recollect. But the time I know when I was going into Sandpoint, I was in the head end of the smoker.

Q. Where were you Mr. Long, if you know, when you got into the smoking-car, the front end of it?

416 A. Well, the best of my belief it would bring me, when I was coming over into the smoker, would be in the neighborhood of about the point where it was shown to me Mr. Adams fell off. It would be just about there.

Q. Now, I will ask you, Mr. Long, if on the former trial you were not asked this question: "When you got back to the smoking-car and passed through it, where was your train at that time? A. At the time I came through the smoking-car the train was approaching Oden. Q. Approaching Oden? A. Yes, sir, the first station this side." Is that correct?

A. Probably it might be; as I state here, that I started from there, and I am just judging by about the time it would take me to go, if I was not stopped by anything unusual, and I don't recollect being stopped by anything, about the rate of speed that the train was running, and the time that I would make, would bring me along between there. The chances are I might have stopped to speak to somebody, or might have examined door-locks, lots of things might take my time for a short duration, but as near as I can recollect the facts I walked on through, and that would bring me in the neighborhood——

Q. Your memory of this would be better six or eight months ago than it would be now, would it?

A. Well, it might be, on certain points.

Q. Well, if this was correct at that time, you would say it was correct now, wouldn't you?

A. I should think so; I don't dispute it.

Q. Now, I will ask you, Mr. Long, if on the former trial these questions were not put to you and the following answers

417 given: "What portion of the car were you in when your attention was called to the whitecaps rolling?" Answer: "That was about one-third of the way in the day-coach, that is from the rear end, as near as I can recollect, it would be about one-third of the way up. Question: "In the day-coach, and it was when you were on the Pack River trestle?" Answer: "No, it was off of the Pack River trestle." Question: "After you had passed off of the Pack River trestle?" Answer: "Yes." Question: "And about how far off of the Pack River trestle?" Answer: "Oh, I should think about four or five hundred feet." Is that the testimony given by you before?

A. Well, I think that is no more than probable. I don't recollect whether that is or not. I couldn't say as to whether I testified to that or not, but then it is about right even if I did.

Q. You think it was about four or five hundred feet?

A. Well, it could be that. I cannot take those distances riding in a train, riding between thirty and thirty-five miles an hour, and come within a few feet of it; but I am telling you just as near as I can.

Q. That has been done, Mr. Long?

A. I know it has; if you knew that the gentleman was going to fall off and everything, and taken notes of it at the time; but I did not do that.

Q. Now, Mr. Long, what was the speed you think they were making there, along there from the trestle?

A. Well, as near as I can recollect, after it left off of the trestle probably they were running between thirty and thirty-five miles an hour, to the best of my judgment.

418 Q. And at the point that we are speaking about?

A. Yes, sir, that would be right where I was looking out at those whitecaps rolling, I think the speed at the time would be about in the neighborhood of thirty or thirty-five miles an hour.

Q. Now, I will ask you if on the former trial you did not testify as follows, to make the testimony clear: "Q. In the day-coach and it was when you were on the Pack River trestle? A. No, it was off of the Pack River trestle. Q. After you had passed off of the Pack River trestle? A. Yes, sir. Q. And about how far off of the Pack River trestle? A. Oh, I should think about four or five hundred feet. Q. What is the fact as to whether the lake is plainly visible on your left at that point or not? A. It is; it runs right along the edge of it. Q. What do you know, if anything, that was causing the rolling of the whitecaps at that time? A. Well, I suppose it was the wind. Q. At what speed was your train running at that time? A. Well, that is something I cannot answer. Q. Did you make any note of it or think about it at all at the time? A. No, sir, not at the time." Is that the testimony given by you on the former trial, Mr. Long?

A. Well, I suppose probably it was. Of course, I cannot tell you. I don't recollect that testimony. But I gave that—when I gave that testimony I gave it from memory the same as I am doing now. And as far as knowing the rate of speed, I don't know what that train was running. But you ask me now about what the rate of speed was, and I am trying to tell you as near as I can remember.

419 Q. Well, if you did not remember it at that, Mr. Long, is it probable that your memory of it is good at this time, eight months later?

A. No, sir, it would not be any better.

Q. Isn't it probable, Mr. Long, that that is correct?

A. That I didn't know how fast they were running?

Q. Yes, sir.

A. I don't know how fast they were running.

Q. Then you paid no attention to the speed?

A. No, sir, because they were not running out of the usual rate of speed that we had run other times in other trips, and there was

nothing to call my attention that we were making anything extraordinary.

Q. Then the fact is, when you say they were running thirty or thirty-five miles there, the fact is you don't know, is it?

A. I don't know how fast they were running. That is just my opinion.

Q. Well, if you had no memory of it, or had it attracted to your attention at the time, on what do you base your opinion?

A. Well, I base my opinion on the ordinary running of the train, that the train made just about the ordinary speed that we generally made, and that there was nothing unusual.

Q. Then it is the ordinary running that you base this opinion on, that it was not unusual?

A. Yes, sir.

Q. And not on what was actually done that time?

A. Well, it would be in a way, that I know that that train was, through that distance that you are speaking of that point,
420 that they ran through there at about that particular rate of speed.

Q. Then this is not correct that you did not pay any attention or know what rate of speed they were running, in your former testimony?

A. That testimony is correct in the former, if I said so, because I don't know now, I don't know how fast that train was running.

Q. Or paid any attention to it at the time? Isn't that correct as you have stated here?

A. That is right.

Q. Now, you say you think, not from paying any attention to it at that time, but you think now that they were running at the usual and ordinary rate of running there?

A. Yes; I have always thought that; always of that impression.

Q. Was thirty-five miles an hour the usual rate of running there, Mr. Long, at that time?

A. Well, it would run all the way from twenty-five to thirty-five miles an hour.

Q. Was thirty-five miles an hour your schedule time, Mr. Long?

A. No, I don't think the schedue rate—for what train?

Q. On that train.

A. That day?

Q. Yes.

A. I had no schedule to go by that day.

Q. No, but your ordinary schedule of running that train. You had a schedule to run that train by, didn't you, ordinarily?

A. Yes, sir.

421 Q. Well, the ordinary time was the schedule time, wasn't it?

A. That would be the schedule time, yes, for a train that is on time.

Q. That would be the ordinary time, would it?

A. For a train that would be on time, yes, sir.

Q. Schedule time. Then when you say ordinary time, what time

do you refer to, if not to the schedule time, the time you ordinarily run the train by?

A. Because the trains were as often late, according to my recollection, as they were on time, and take it one trip after another, I think that would be the ordinary rate, that we generally ran at, late or otherwise.

Q. Then you generally ran by another rate of speed than the schedule rate over that track?

A. If we were late.

Q. But you are speaking of the ordinary rate of speed, not when you were late, but the usual customary rate of speed?

A. Well, I don't understand the question.

Q. Did you ordinarily run by the usual rate of speed except upon extraordinary occasions when you were late?

A. Yes, sir.

Q. Usually ran by the schedule rate, didn't you?

A. Yes, sir.

Q. That was the usual and ordinary rate of speed?

A. Well, if we were on time; I want to explain that, and I want to answer it. The question is: If the train was on time——

Q. I want to know——

Mr. THOMPSON: Let him explain.

422 Mr. R. H. VOORHEES: He may explain on the redirect examination.

The WITNESS: All I want to get at is what you want, I will answer it.

Mr. R. H. VOORHEES: I want him to answer the question.

The COURT: Answer the question as near as you can, Mr. Long. Don't add anything by way of explanation, but give as simple an answer as you can.

Q. I would like to know what is the usual and ordinary rate of speed at which you usually ran over that track, whether it was the schedule rate or not, between Hope and Sandpoint.

A. I don't understand that question; that is the only thing that is the matter with me.

Q. I will repeat it. I want to know whether you usually ran over that track between Hope and Sandpoint according to the usual ordinary rate of speed as shown by your schedule.

A. I will say no. That is the best I can do.

Q. You habitually, you customarily, disregarded your schedule, did you, over that piece of track?

A. In some instances.

Q. Then that would not be customarily, if it was only in some instances, would it? It would be the exception to your ordinary way of running, would it?

A. The trouble about it, I cannot answer the question because you give two of them in that one, according to my way of thinking. It may be clear to you. If I knew which way you wanted it then I could tell you.

423 Q. If you disregarded it at different times did you run over it on another rate of speed more times than you did the schedule rate?

A. Well, I should think it would be about, just about an equal number of times.

Q. Then when you refer to the usual rate of speed and say that you were running that time by the usual rate of speed, what rate of speed do you refer to?

A. Well——

Q. The unusual rate of speed, that is that not run by the schedule, or the schedule rate of speed?

A. That is what I am getting at now. When the train was late it was the usual rate of speed we would make across there, when it was a late train and we was making up time.

Q. I want to find out what rate of speed you consider the usual rate of speed. Is it the schedule rate of speed, or the speed of some emergency that you may have to make there? Wasn't there a usual fixed rate of speed for you to run over that track by, according to your schedule?

A. It would be for a train that is on time. There are two rates of speed.

The COURT: You have asked the same question a number of times. Don't go back to that any more.

The WITNESS: I want to answer. There are two rates of speed.

Mr. R. H. VOORHEES: I have never been able to get an answer as to what the usual rate of speed is.

424 A. I do not know what is the usual rate of speed. If there is two rates, I cannot tell which one you want.

Q. Then you don't know which one is the usual rate of speed.

A. I don't know what you term as that.

Q. What was the schedule rate of speed?

A. I don't know exactly.

Q. Do you know whether that was higher or lower than 35 miles an hour?

A. Lower.

Q. Any idea how much lower?

A. Not at that given point I don't know.

Q. Now, Mr. Long, you say that you noticed nothing unusual along there that night. What do you mean by the term "unusual"?

A. Unusual swinging of the train; or extraordinary fast running, reckless running we term it; there was nothing of that to draw my attention to it.

Q. You mean by that, no running outside of the schedule rate? You don't mean that, do you, when you use the word "unusual"?

A. No, I don't mean that; I mean that it was not anything but what was a common occurrence for us to run along about in that same rate of speed.

Q. Well, that is when you were behind, wasn't it?

A. Yes, sir.

Q. Nothing unusual when you are behind time?

A. Nor a train on time. I don't think that there was such a difference in the speed that you would not specially notice it one way or the other.

Q. When the train was on time were you in the habit of going faster than your schedule?

A. No, sir.

425 Q. Then faster than your schedule, there, when the train was on time would be something out of the ordinary, wouldn't it?

A. Out of the ordinary for a train that was on time.

Q. It would be out of the ordinary for a train that was on time?

A. Certainly.

Q. So that usually you did not make faster than the schedule time, except when the train was not on time?

A. Not as a rule, no, sir.

Q. So when you say it was nothing extraordinary, you mean to say nothing extraordinary when you were running behind time, don't you?

A. No, sir. I mean to say that the train, if I was on that train and it was running there along through that part of the road, if I did not know anything about the orders—if I had been deadheading for instance, with some other crew and was on that train, I would not take into consideration whether that train was on time or whether it was running making up time.

Q. Well, if the train was running nine or ten miles an hour faster than your schedule, it would not do that except when you were behind time, would it?

A. Not as a rule.

Q. At that place?

A. Not as a rule, it would not.

Q. Then such running would be out of the ordinary, and extraordinary, wouldn't it?

A. No, sir.

Q. Well, we will let it go at that. Now, you have said that you don't remember any extraordinary lurching?

A. No, sir.

Q. You noticed some lurching, Mr. Long, on the train, along those curves that night.

426 A. I have no remembrance of it.

Q. Then you don't remember any lurching?

A. No, sir, I don't.

Q. Or sway of the cars?

A. No, sir.

Q. None whatever?

A. Oh, well, if a man is on a train, they are bound to oscillate to a certain extent, but then what I had reference to was there was nothing more than what I was accustomed to on my other trip I went over there.

Q. Would not eight or ten miles an hour higher than the schedule rate increase the sway of the cars around those curves some?

A. Yes, it would to a certain extent, but not to be noticeable to any great extent.

Q. Somewhat noticeable, wouldn't it?

A. It might or might not.

Q. It would increase it some, wouldn't it?

A. It has a tendency to do that, certainly.

Q. Yes, it has a tendency to do that. Would you swear that noticeable lurching did not take place on that train that night, Mr. Long?

A. That is, it was not noticeable to me.

Q. You just don't remember?

A. I don't remember, no, I don't. There was nothing there to impress it on my memory that there was.

Q. You had gone over that route a good many times behind time, at faster speed than usual, hadn't you?

A. Yes, sir; that is, I believe I have.

Q. So that that faster speed was not an unusual thing to you over that line of track there?

A. No, sir.

427 Q. Now, Mr. Long, I will ask you, after getting into Spokane, if you did not go to the Hotel Spokane.

A. Yes, sir.

Q. That night?

A. Yes, sir.

Q. That is the night of the 13th?

A. Yes, sir.

Q. And I will ask you if you did not meet there Mr. Thomas Kilpatrick, who was at that time a brother conductor on the road.

A. I don't recollect.

Q. You may have met him?

A. I may have, and may not.

Q. I will ask you, Mr. Long, if you do not recollect a conversation with Mr. Kilpatrick at the Spokane hotel that night of the 13th of November, in which, after the loss of Mr. Adams from the train had become known to you, you stated to Mr. Kilpatrick that you felt pretty sure that Mr. Adams had been lost from the train among the rocks and curves about Pack river?

A. No, sir.

Q. You have no recollection of that statement?

A. I know that I never made that statement to him.

Q. You are positive that you did not state that?

A. Yes, sir, I am positive of that.

Q. Mr. Kilpatrick was on the road at that time. Do you recollect that?

A. He was employed here; yes, sir.

Q. Conductor, was he not?

A. Yes, sir.

Q. You entertained no such opinion at that time?

A. No, sir.

Q. Sure you never expressed it?

A. I know I did not.

Q. Now, you said on your direct examination that in your
428 opinion they were running about at the rate of forty miles an hour over along that stretch of track there to Oden; is that correct?

A. No, sir.

Q. What did you state with reference to forty miles an hour?

A. I said that the best of my belief, that that train did not exceed at any one point between Hope and Oden, to exceed the speed of forty miles an hour.

Q. You think it may have reached forty miles an hour?

A. I think it did, or nearly forty, or in the neighborhood of that, by the time it got to Oden, or say in a half a mile of Oden.

Q. You are clear and positive that it did not reach that speed before within a mile or a half a mile of Oden?

A. To the best of my belief we did not exceed it; or that there was no point reached that, before we were getting near Oden.

Q. If you paid no attention to the speed this side of the trestle, Mr. Long, when was it you began to pay attention to the speed, so as to formulate this opinion that you now express?

A. Well, it was from the time we left, along in down—at the time that the train reached a point I should think maybe a half or three-quarters of a mile east of Oden, from there clear on into Sandpoint.

Q. I am speaking of the point in reference to the opinion of the speed between the trestle and Oden. When did you begin to notice the train so as to formulate that opinion?

429 A. Well, I should think about half or three-quarters of a mile from Oden.

Q. East of Oden?

A. East of Oden, yes, sir.

Q. You did not give any attention to the speed up to that time?

A. No, sir.

Q. Then you really don't know, from your own attention to the matter that night, what the speed was up to that point, do you?

A. No, sir; I couldn't tell exactly the speed, but then I know in a general way about what it was.

Q. How long do you think you were in the smoking-car, Mr. Long, going toward the rear of the train?

A. Going back?

Q. Yes.

A. Probably two minutes, two and a half, maybe not that long; maybe probably two minutes along in there, close to two minutes.

Q. And then through the day-coach; how long do you think it took you?

A. Probably a minute or a minute and a half.

Q. And to go through the tourist-car?

A. Well, just long enough to take a walk through it.

Q. The same way as to the dining-car?

A. Yes, sir; go right on through.

Q. And the same way as to the sleeper?

A. Yes.

Q. For aught you know, the reason why you did not see Mr. Adams might have been that he was in one of the closets, might it not?

A. As I passed coming back from the rear?

430 Q. Yes.

A. Yes, sir, possibly, he could have been.

Q. Quite possible. It might very readily have happened that way, might it not?

A. Certainly.

Q. Where did you get on the train, Mr. Long?

A. Helena.

Q. Did the train run unbroken from Helena? The train ran in just the same condition through to Spokane that it started in from Helena, didn't it?

A. The same makeup, yes, sir.

Q. This was the end of your run, wasn't it?

A. Yes, sir.

Q. You stated that the lake shore was about one hundred feet from the track at the point where it was pointed out to you Mr. Adams' body was found? Is that correct?

A. Well, that is as near as I could state. I just looked up there from the train, and of course it might be one hundred and fifty feet or——

Q. Might it not be seven or eight hundred feet?

A. I don't think it; if I am any judge of distances it would not be that far.

Q. Were you running along that track the next spring and summer—have been running there ever since, haven't you, ever since this accident?

A. With the exception of four months.

Q. When were the four months?

A. That would be from—let us see, that would be February—from February until along about the 10th of June in 1899.

Q. You stated that you saw nothing of some elk horns

431 with Mr. Jeannot. What do you mean to say, that they were not there, Mr. Long?

A. No, sir; if I said I did not see them, I will change that to read that I have no recollection of them.

Q. They might have been there, might they not?

A. They may have been there.

Q. Yes, sir; and it might have been that you had some conversation or controversy with Mr. Jeannot with regard to them without remembering it at this time, might it not?

A. It could have been possible.

Re-examination.

(By Mr. THOMPSON:)

Q. In response to Mr. Voorhees' question you stated that you were just about as often late as on schedule time on that train. Now, I will ask you as a matter of fact whether you always had the same

schedule to run over on that road when you were on schedule time, whether you had always had that same schedule that you had on that particular day, or did you have a slower or faster schedule at different times?

A. Why, whether there was in that time that I run over, that three months—whether up to that three months they had given out a new schedule or anything in the meantime, I don't recollect.

Q. What do you know as a matter of fact whether when you were on schedule time, having had to run faster on account of meeting trains or anything of that sort?

A. Yes, there are times when we have to run faster than the schedule time, to make a meeting point.

432 Q. What do you know as to the fact as to whether you did do it on that particular distance from Hope to Sandpoint?

A. We did not.

Q. So far as the three months that you were there?

A. Well, I won't say as to the three months are concerned, perhaps we might have done it during that time.

Q. That is what I am asking you whether you might have had to make a faster time during that three months?

A. I don't know as a matter of fact on that; it might have been.

Q. You don't know. Now, you said that those cars had a cooking range in them. As a matter of fact a large number of the tourists cooked their provisions in the car, did they not?

A. Yes, sir; the range is placed there for that purpose.

Q. As a matter of fact, don't you know whether or not they actually did do that?

A. I have seen lots of them using the range, doing cooking.

Q. I will ask you what is the fact as to whether or not those people used the rear or front platforms, the open unvestibuled platforms for the purpose of stepping out and throwing debris out when they would get through their cooking, if you know anything about that?

A. Well, I have seen them where they have thrown their debris out.

Q. You don't know whether or not that has anything to do with the reason why they were not vestibuled?

A. No, sir.

433 Q. A question of accommodation or anything of that kind?

A. No, sir.

Q. What do you know, as a matter of fact, as to whether those passengers in the tourist-car are permitted to and do, many of them, take advantage, and did at that time, of the dining-car service, to go into the dining-car and get meals?

A. They had a right to go back there; that is, it was for them to go there if they wanted to.

Q. What do you know as to whether or not during your service they did do it, or did not?

A. I cannot recall any one time, but they frequently went back there to eat.

Q. Do you know whether that was confined to men alone, or whether men, women and children did it?

A. Men, women and children.

Q. Now, you say, in taking up the tickets of passengers on this particular day, you came down from the front end of the smoking-car. I will ask you if that is the usual custom of yourself as well as other conductors in taking up tickets?

A. Yes, sir.

Q. And as a rule the passengers sit facing to the front, do they not?

A. Yes, as a rule.

Q. The seats, unless turned by the passengers, are all faced in that way?

A. Yes, sir.

Q. And the practice is for the purpose of meeting the passenger face to face when you come down to take his ticket?

A. Yes, sir.

Q. Now, when you go through the car, what is the fact as to whether you made it a rule to take all the transportation from every passenger as you would go down?

434 A. That is the rule to take up them all.

Q. Then if a passenger follows after you and passes you, you note the fact, because you may find him in the next car that you go into then?

(Objected to as leading.)

Q. What is the fact with regard to that?

A. The fact is that I might have missed him and not got his ticket at all, and that he had been in some water closet or been ahead in the express-car or something, and came back, and if you did not notice him, whether you had got him before, his transportation, the consequence is you would overlook him entirely, probably.

Q. If, however, you had gone entirely through the car to the back end, and you were going forward and you should meet a passenger, why would your attention not be particularly attracted to him then?

A. The chances are he would have the hat check, or if he did he would be a person that I was acquainted with or know where he was going to, and knew that I had got the transportation, and if I did not know the person, the hat check would indicate that I had got his transportation.

Recross-examination:

Q. Mr. Long, were the trains actually made up when you took charge of them at Helena, when they came into Helena, in the same way that you describe?

A. The makeup of the trains?

Q. The makeup was not changed at Helena when you took charge?

435 A. Not to the best of my knowledge; that train came in there just as I took it out.

Q. Now, you have stated the speed at the various points along the road from Oden to Spokane that night; do you remember your schedule that you had been running on for that night along those points?

A. No, sir.

Q. You don't know what the schedule rate was, nor the schedule time?

A. Do you mean the schedule time of that train?

Q. Yes, sir.

A. No, sir; I don't know; I don't remember.

Q. You don't remember what the schedule was?

A. No.

Q. You had been running on the same schedule for probably some time, had you not?

A. Probably I had; it may have changed, you know, but I have forgotten; I don't remember whether it had been changed or not.

Q. But you do run on one schedule for quite a while ordinarily, do you not?

A. Well, it varies; sometimes it lasts three weeks or a month, and then we have new ones. It could have been changed; but whether it was changed in that time or not, I don't know; I don't remember.

Q. What is the highest speed you think you ever made over that track, in the three months' service there?

A. Where is that?

Q. Between Pack River trestle and Oden?

A. I don't think that there was any time there that I ever exceeded forty miles an hour.

436 Q. That is in the three months?

A. Yes, sir; or since then.

Mr. R. H. VOORHEES: I move to strike that out, your honor, as not responsive to my question—what happened since?

The COURT: Strike it out.

Q. Can you recall the rate of speed on those various points, on the day preceding the 13th of November?

A. No, sir.

Q. Or on the day succeeding?

A. No, sir.

Q. Any special day within two or three weeks either way, after or before that you can recall the rate of speed that you made at each of those points?

A. No, I don't think that I can.

Re-redirect examination.

(Mr. BUNN:)

Q. Why not, Mr. Long?

A. Well, nothing occurred that I had to refresh my memory upon it.

Re-recross-examination:

Q. You did not know at the time you fixed those rates of speed in your mind, at these various places on that run, that Mr. Adams had then fallen off of the train, did you?

A. I did not know it, no, sir.

Q. Nothing at the time to make you fix these in your mind, was there?

A. No, sir.

Q. That is all.

A. That is——

(Excused.)

437 ORIGIN MARTEL LAWRENCE, testified:

Direct examination.

(By Mr. THOMPSON:)

Q. State your name to the jury, Mr. Lawrence.

A. Origin Martel Lawrence.

Q. Where do you reside?

A. I reside in Linn county, Oregon.

Q. How long have you resided there?

A. Ever since my return from Cape Nome, that is, about a little over five weeks.

Q. What is your business at present?

A. I am on a stock ranch.

Q. And what was your business before you went to Cape Nome?

A. Passenger brakeman on the Northern Pacific.

Q. How long had you served as passenger brakeman on the Northern Pacific railway?

A. Going on six years.

Q. On what run?

A. From Helena to Hope, the biggest portion of the time; but after the division was changed to Spokane, we ran from Helena to Spokane.

Q. How long had you been running from Helena to Spokane? How long had you made that run?

A. Well, it was—let's see—I ran from Helena to Spokane from the first of November until immediately after the conclusion of this first trial.

Q. That was when, do you recollect?

A. The conclusion of this trial, you mean?

438 Q. The first trial; last spring, wasn't it?

A. Yes, it was last April; some time in April. I left Helena for Nome on the 20th of April.

Q. Where were you serving on the 13th of November, 1898?

A. I was braking on passenger train No. 1 from Helena to Spokane.

Q. Who was your conductor?

A. Sam Long.

Q. And who was the engineer that ran the train?

A. Mr. Matheson.

Q. Now what time in the day, if you recollect, did you arrive at Hope?

A. On our running time, or on that day?

Q. What time you actually did arrive, if you recollect, as near as you can?

A. Rocky Mountain time, we arrived at Hope at 5:10.

Q. And do you recollect what time you left Hope?

A. Yes, sir. We left Hope at 4:15 Pacific time.

Q. What sort of a train did you have when you left Hope; just describe to the jury that train and how the different cars were placed in the train?

A. We had the mail, the baggage, the express, the smoking-car, first-class day-coach, a tourist-car, a dining-car and a sleeper—Pullman sleeper.

Q. Making eight cars altogether?

A. Yes, sir.

Q. Now, you may state to the jury what the fact is as to whether the rotation of the cars, or order in which they were placed was as you have stated them, whether that was the order in which they were usually in the train.

439 A. That is the order they had been placed on those trains for several years.

Q. What is the fact as to whether that tourist sleeper was a vestibuled or an unvestibuled car?

A. It was not vestibuled.

Q. During the time that you have been running on the Northern Pacific railroad, I will ask you what the fact was as to whether each train brought one or more of those tourist sleepers?

A. It was a general thing to always have one; we always had one, I don't ever remember of a train that I was on or even saw come through this part of the country that it did not have one on; sometimes two.

Q. What was the fact as to whether those sleepers were vestibuled or unvestibuled?

A. The tourist sleepers?

Q. Yes.

A. I never saw a tourist sleeper up until that time vestibuled; no, sir.

Q. What was the fact as to whether that was the position in which the tourist sleepers were usually placed, where this one was placed?

A. For the last—well, for several years before that, it was.

Q. Had you ever seen them placed any other way?

A. Yes, sir; when I first went on the road.

Q. How were they placed then?

A. They were placed ahead of the smoking-car when I first went to work for the Northern Pacific.

Q. Afterwards, they were changed back where?

440 A. Afterwards there was an order out that they should be placed back next to the diner, for convenience, I understood, for dining, for the dining-car.

Q. What is the fact as to whether or not the passengers contained and carried in the tourist sleepers did or did not visit the diner?

A. A great many of them did.

Q. What class of passengers, whether men only, or men, women and children?

A. Men, women and children.

Q. On the day that you left Hope, at 4:15 in the evening, what was the condition of the light out, whether it was dark or whether it was light at that time when you left Hope?

A. The daylight you mean?

Q. As to whether it was light out of doors or not.

A. Yes, sir; it was light.

Q. Have you any recollection of the passage of that train from Hope to the Pack River trestle?

A. Yes, sir.

Q. What were you doing during the time it was going from Hope until it reached the Pack River trestle?

A. My duty, after helping the passengers off, was to go right back to the rear end of the train, and my conductor would give me a signal when he was ready to go, and I would give the engineer a signal with the whistle cord, to go; and I would then be standing on the steps, and reach up when I got the signal and pull the signal cord, and the engineer would know all was well behind, and he would start out.

441 Q. Was that signal cord pulled for him to start, or was it to signal that all was well?

A. For him to start.

Q. Now, on that particular day where were you located on the train when you actually did start out from the station, when the train moved out?

A. On the rear end of the Pullman sleeper.

Q. In the sleeper or out in the vestibule?

A. Out on the steps; but the vestibule door was open. I was standing on the steps when they first started to pull out.

Q. What did you do then?

A. I stood there and watched ahead, until the train got under way, passed the platform, to see that everything was all right and nobody trying to get on, or anything.

Q. Was that something usual for you to do, or unusual?

A. Always done it, always supposed to; a part of my duty.

Q. When the train had attained sufficient speed that you were satisfied no one would get on, what did you then do?

A. I looked on the opposite steps across the vestibule to see that there was nobody sitting on that step, closed the vestibule; went through the sleeper.

Q. Explain to the jury what steps you took to close the vestibule; how it was closed.

A. Well, that is a sort of a double door; it folds up, and
442 folds back; it was at that time; you just swung it around, you know, and opened the other half, and closed it with a sort of a clasp knob, it is not a round knob, but sort of a clasp.

Q. Did that close and make safe the platform below that you were standing on?

A. Yes, sir.

Q. You did not have to let down any door over the step?

A. No, sir; not that kind.

Q. Was that what is known as the wide, or narrow vestibule?

A. Narrow vestibule.

Q. After you had got that vestibule closed, what next did you do?

A. Started immediately for the forward end, closing the vestibules as I went.

Q. When you passed to the front of the Pullman sleeper, what did you do, if anything, towards closing the front vestibule?

A. The porter closes that, the porter of the car; I had nothing to do with that.

Q. The porter closes the front vestibule.

A. It was my duty to close the next one if it was open.

Q. Well, when you went through had the porter closed the front vestibule?

A. Yes, sir.

Q. Where did you go then when you stepped out of that car?

A. Went into the dining-car.

Q. Did you stop in the dining-car or continue on?

A. No, sir; went right on through.

Q. Where were you, about what part of the road were you on when you passed through the dining-car?

A. Well, we was just about the lower end of the yards, somewhere along there.

443 Q. What degree of speed had the train attained between there and Pack River trestle?

A. I didn't notice anything out of the way, more than common.

Q. When you went through the dining-car what car did you come to then?

A. The tourist.

Q. When you stepped out on the p-atform of the tourist sleeping-car, did you note anything there? Do anything or did you pass right on?

A. Passed right on into the day-coach.

Q. Into the tourist sleeper?

A. Into the tourist sleeper, through the diner into the tourist.

Q. Did you perform any work in the tourist-car?

A. No.

Q. Did you go on from that out across the front platform of the tourist-car?

A. Yes, sir.

Q. And into what car?

A. The first-class coach.

Q. What did you do in the first-class coach?

A. Shut the vestibule on the right-hand side, next to the station.

Q. That was open at the time, was it?

A. The vestibule door, yes, sir.

Q. When you closed that vestibule, what did you do?

A. Passed right on through the day-coach.
Q. And what did you do at the front end of the day-coach?
A. Closed that vestibule door.
Q. Also?
A. On the right-hand side.
Q. Where did you go then?
444 A. Passed on out into the smoking-car.
Q. What did you do there?
A. Well, I stood there just an instant, a little bit, and I met the conductor there.
Q. Whereabouts in the smoking-car did you meet Conductor Long?
A. Right back near the cooler, at the rear end of the smoking-car.
Q. What was the conductor doing at that time?
A. He had just been taking up transportation, coming through from the front end.
Q. Anything occur between you and the conductor there?
A. Yes, sir; he sent me back with a message.
Q. When you say message, was it a telegram or written message or verbal?
A. It was a telegram for either the dining-car or Pullman-car conductor, I don't remember just which it was.
Q. You took the telegram, and what did you do?
A. I went back with it.
Q. Left the conductor at that point?
A. Well, I don't know whether he walked ahead of me for sure, or whether I went ahead of him; I could not swear positively now to that.
Q. Well, you did go back through those cars again?
A. Yes, sir; I went back.
Q. And where did you go?
A. I am positive that I went into the diner, and I believe into the front end of the Pullman-car; I won't swear to that.
445 Q. But whichever car you did go in, state what the fact is as to whether you found the person to whom the message was directed?
A. Yes, sir.
Q. And what did you do?
A. Delivered it.
Q. How long did you remain there?
A. Well, I did not remain there any length of time to speak of; I turned around and went back to the front end, or to the day-coach.
Q. You went through the diner and the tourist car to reach the day-coach?
A. Yes, sir.
Q. What did you do as to going into the day-coach?
A. I just stepped into the rear end of the day-coach, opened the door, and just got in——

Q. At what point had you reached when you went into the day-coach?

A. When I went into the day-coach, as I stepped out of the tourist-car onto the front platfom of the tourist-car, we had just struck the frog of the Pack River sidetrack.

Q. Now, I wish you would describe to the jury where that Pack River sidetrack is.

A. It is on the left-hand side coming this way, just after you leave the trestle.

Q. I wish you would come over here, Mr. Lawrence, to this map, and let me ask you some questions. (Witness goes to map.) Do you recognize on this map anything that represents to you the Pack River trestle?

A. I should judge the red.

Q. You think that red is about where the Pack River trestle is?

A. Yes.

446 Q. Now, if that red portion of this line correctly represents the Pack River trestle, where would the Pack River frog be, and sidetrack that you speak of?

A. Right along here. (Indicating.)

Q. On the left-hand side as you come towards Spokane?

A. Yes, sir.

Q. How long a sidetrack was that?

A. Well, it is a sort of—it is on a curve there, you cannot see the end of the curve well by standing at one end.

Q. Well, about how long is it?

A. It is a medium size I should judge, sidetrack.

Q. There is a four-degree curve marked there, as you go off of the end of that trestle; is that correct?

A. Yes, sir.

Q. Well, is it on that curve?

A. Yes, sir.

Q. Where is the frog located that you say you were just striking that frog as you went out on that platform?

A. At the east end of the siding.

Q. And how near was that frog, as you recollect it, to the end of the trestle?

A. Well, it was very close, I cannot tell you the feet.

Q. When you say very close do you mean within a few hundred feet of it?

A. Well, it may be one hundred and fifty or may be two hundred feet.

Q. Now, you may take your seat back there (on the witness stand). What called your attention to the fact that you were leaving the Pack River trestle when you came out on that front platform of the tourist-car?

A. It was very windy there, very windy, in fact it was so

447 windy that I reached over and took hold of the railing myself and stopped and gazed out; it kind of surprised me that the wind should be blowing so much stronger there than it was

at Hope when we left. And I just reached out like that and grabbed hold of the railing and started to look out across the lake.

Q. What was the condition of the water as to being placid or otherwise?

A. It was rough, with whitecaps, and roaring quite a great deal.

Q. What called your attention, if anything, to the switch?

A. The noise, and the little jerk that passing over a switch always makes when the train is running over it.

Q. How long did you remain on that platform before going into the day-coach?

A. Well, just about like that (indicating by pause) and stepped right on in.

Q. When you got into the day-coach, what did you do?

A. There was a gentleman coming down the aisle, and I sat down on the right-hand side, the last seat in the day-coach, the rear end of the day-coach; I sat down in this seat, as much to get out of the way as to get a seat that was empty; and he passed by.

Q. Now, I will ask you to describe to the jury the gentleman that came down and met you there at that point.

A. He was a man, I should judge, about my height; but a heavier man than I am.

Q. What kind of a looking man?

A. He was rather round, ruddy-faced looking man, short, heavy-set.

448 Q. What would you say as to whether he was wearing a beard, or was smooth faced?

A. He was a smooth-faced man.

Q. What kind of a hat did he have on?

A. He had a dark derby hat, one of those round-top derby hats.

Q. Had you ever seen that gentleman before?

A. Yes, sir.

Q. How often had you seen him before?

A. I could not say. I saw him on the train; his face was familiar, but I did not know the gentleman.

Q. You did not know him by name?

A. No, sir.

Q. But you had frequently seen him on the trains?

A. I could not say how often, but I had seen him often enough to be accustomed to his face.

Q. What did he do as to whether he stopped and talked to you or went on?

A. He never stopped or spoke to me.

Q. He went on, did he?

A. He went on.

Q. Did you see him after he passed you?

A. I did not, after he went out the swinging door, next to the outer door.

Q. After he went out in the vestibule?

A. Yes, sir.

Q. Of that car, you did not see him after?

A. No, sir.

Q. Now, the next car that he would reach in his passage in that direction would be the tourist sleeper?

449 A. Yes, sir.

Q. Did you ever see that gentleman again?

A. I never did.

Q. Either in death or in life?

A. Never.

Q. Had you noticed him before on the train?

A. Before I met him there?

Q. Yes.

A. No, sir, no, I had not.

Q. From the experience that you have had as a brakeman, and in other employments in the railroad, and riding upon the trains during the length of time that you say you have, what was there, if anything, that attracted your attention as being peculiar that day in the speed or movement of the train? If there was any difference, whether there was anything unusual in the movement of the train?

A. Going into Sandpoint we run pretty rapidly.

Q. I mean at that point only, that we are speaking of; at the time you saw Mr. Adams, or the gentleman that you did see there, what was there unusual?

A. Nothing, nothing unusual.

Q. Now, what were you going to say about going into Sandpoint?

A. Going into Sandpoint we ran pretty fast; I noticed we was running pretty fast there.

Q. Where was it that you noticed that fast time?

A. It was about three or four miles from Sandpoint.

Q. And could you tell about what degree of speed you had attained there?

A. Well, I should judge we was making fifty miles an hour anyway; maybe more.

450 Q. Well, how much more?

A. Possibly sixty.

Q. Had you ever ridden over that portion of the road before?

A. Oh, many a time.

Q. Now, I will ask you to state to the jury what the fact is as to whether the rate of speed that you was making from Hope until you reached say the 8 mile post up there around those cur-es, what there was unusual, if anything, in your speed, or in the motion of the train, that day?

A. There was nothing that discommoded me in the least, neither did I see anyone else discommoded by the jerking or motion of the train whatever.

Q. What did you see, if anything, of the gentleman, the witness who testified here, Mr. Jeannot, of Hope; did you see him on the train?

A. Yes, sir, I met Mr. Jeannot on the train.

Q. Where did you meet him?

A. In the smoking-car.

Q. On what place in the smoking-car?

A. In the rear, the rear of the smoking-car.

Q. What, if anything, attracted your attention to him, or his to you?

A. There was a large pair of horns standing right next to the cooler, the water cooler; very high pair of horns, and they were sitting up and the points of the horns—they were large elk horns, I should judge—there were a great many points on them and they were sticking out into the car.

451 Q. Into the aisle?

A. Well, there is a seat or so out here, where the water cooler is; and this set right back here against the car—in the aisle as we may say; but this seat I think is left out for the news agent's purposes or something of that kind, anyway it is left out, and it leaves a large square place there near the water cooler, and these horns were set up close to the water cooler, leaning against the side of the car.

Q. What took place between you and Mr. Jeannot, or anyone else and Mr. Jeannot?

A. I spoke up, I said, "Who owns those horns?" and Mr. Jeannot stepped up to me and he says, "I own them, they are mine." "Why," I said, "you should have got them in the baggage-car or express-car; that is not a proper place for such things as that." And he said, "Well, I am only going to Spokane." And I said, "Well, if you are only going—if you were going any farther along I would make you put them in the baggage-car or express-car, they are not a fit thing to have lying there, with the points sticking out like that."

Q. Where was the conductor at that time?

A. The conductor spoke to me about the horns himself shortly after that; he came in.

Q. Well, was the conductor present at the time you were talking with Mr. Jeannot?

A. No, he was not.

Q. Now, you can go on.

A. The conductor spoke to me about the horns afterwards.

452 Q. You need not tell what he said. Was there anything further occurred in connection with Mr. Jeannot?

A. No, no, that is all.

Q. Now, after you saw this gentleman coming down the aisle and passing you as you speak of, what, if anything, or was there anything to attract your attention with reference to the speed of the train at the time you speak of, going into Sandpoint?

A. No, sir.

Q. What lurching or jarring or shaking of the train did you discover before that time?

A. After my second return from the rear, I stood up the biggest part of the way to Sandpoint, in the rear of the smoker, that is quite a piece at least, and there was a great many, I guess half a dozen gentlemen standing there too along with us, and none of us was thrown down or discommoded in any way.

Q. What is the fact as to whether it was light or dark when you reached Sandpoint?

A. It was sort of dusk.

Q. Just describe to the jury now, what you mean by that.

A. Well, it was light enough that I could see all the signals very plainly, see everybody and recognize everybody all along the train, conductor and everybody like that; but still it was after sundown, I should judge.

Q. Mr. Lawrence, in passing through a tourist sleeping-car or any other car, when the door is shut, and passing out on to an
453 open platform, what is there, if anything, to attract your attention to the fact that the platform is open?

A. Well, it is everything.

Q. Just describe.

A. A man could not step out on to an open platform and not know that it was an open platform when the train is running.

Q. Why?

A. It is (witness imitates a roar), and the wind is blowing, fairly; and everybody that ever rode on a train knows that. They would know in an instant if they were on an open platform.

Q. When you passed Sandpoint and started from there on to Spokane, what is the fact as to whether your speed was increased or whether it was slowed down, diminished?

A. After we left Sandpoint we went along at an ordinary gait, that is what you would call an ordinary speed until we got near the lake, lake Cocolalla, down there somewhere, and then we began to run very fast and he run very fast clear to Rathdrum.

Q. What speed would you say he attained from there to Rathdrum?

A. Well, I took out my watch, I had the habit of counting the speed you know, and I took out my watch and I tried to count, about after we left Athol, I tried to count the clicks of the joints of the rails and I could not count them; I could not count them at all.

Q. You could not keep the run of them?

A. No, sir.

454 Q. What was your judgment as to the rate of speed attained after leaving Athol?

A. Well, I should say sixty, sixty-two or sixty-three, maybe more, miles an hour.

Q. How long did you stop at Athol?

A. We did not stop at Athol at all.

Q. How long did you stop at Rathdrum?

A. Well, I did not take our stop there, we just—it was a very short stop; we made just the one stop and it was very short, and we pulled right out to Spokane.

Q. After leaving Rathdrum, what kind of speed did you make from there to the O. R. & N. crossing here at Spokane?

A. Very fast.

Q. What do you mean by very fast?

A. Well, similar to the coming into Rathdrum.

Q. Well, what would you say, forty, fifty, sixty, or seventy, or what?

A. Well there is a grade, up grade, this side of Rathdrum a piece, and, of course, he did not make his best time up there as he had coming into Rathdrum. But after he got over that again, he just let it go again and sailed right in, I should judge sixty or maybe sixty-five miles an hour.

Q. When you got to the O. R. & N. crossing, what did you do then?

A. We did not come to a dead stop there, my recollection is that he came—slowed them right down slow, and while they were yet in motion he released the brakes and came right on across the track.

455 Q. When you say slowed right down slow, how fast was he going?

A. So a man could get off easy, I suppose. That was the custom of the train.

Q. Then, from that point into Spokane, how fast did he come?

A. Well, he ran pretty lively, pulled right on in.

Q. Well, what would you say?

A. I should judge he pulled in the most of the way from there, after he got started, thirty or thirty-five miles an hour.

Q. I believe you stated you had made many trips from Hope to Sandpoint?

A. Yes, sir; I worked steady.

Q. What is the fact as to whether you had made trips before faster, or whether they were slower than that?

A. Well, I could not say as to that; I think we had rode just as fast; I would not swear, because I could not say; but I think that we rode just as fast before.

Q. What is the fact as to whether that train was usually on time at Hope, leaving Hope, or whether it was as often late as on time?

A. It was very seldom that we ever got out of Hope on time.

Q. Why was that?

A. We only had five minutes at Hope, and we changed engines there. And the head brakeman had to—especially when they had the steam hose connected for heating the train, he would

456 have the steam hose to break, and it was pretty hard to do; and the air pipe for the train, for breaking purposes; and also the——

Mr. R. H. VOORHEES: I think that is all immaterial, if your honor please.

The COURT: I think so.

Q. As a matter of fact, you say you rarely ever got out of Hope on time?

A. Rarely ever got out on time.

Q. And what is the fact as to whether you attempted, or did not, during this time—attempted to make up the time from there to Spokane?

A. Yes, sir.

Cross-examination.

(By Mr. R. H. VOORHEES:)

Q. You think then that you as a rule more times than not, had to make up time from Hope?

A. Yes, sir; yes, sir.

Q. How much more frequently do you think you were late than on time?

A. Well, to give you my honest opinion, I would say that two-thirds of the time we were late out of Hope; I would judge that we were late out of Hope two-thirds of the time.

Q. How extensive were those delays?

A. Well, some more and some less.

Q. Were you two-thirds of the time three hours late or two hours late?

A. Oh, no, no, I would not say that.

457 Q. A few minutes late you are speaking of, aren't you?

A. Yes, sir; sometimes away late.

Q. But when you say two-thirds of the time, you mean some minutes?

A. We were some late out of Hope, yes, sir.

Q. A few minutes? Now, Mr. Lawrence, when you were coming back from the rear end of the train, after you had taken the telegram there, you say you came through the diner. Now, just as you stepped out of the diner onto the unvestibuled platform of the tourist, where were you then?

A. Just as I stepped out of the diner?

Q. Onto the first unvestibuled platform of the tourist.

A. We were near the west end of the Pack River trestle.

Q. Weren't you rolling off of the west end of the Pack River trestle?

A. Not when I stepped out of the diner.

Q. Onto the first platform of the tourist?

A. No, sir.

Q. Sure of that?

A. Yes, sir.

Q. Absolutely certain? Well, I am waiting. Are you absolutely certain?

A. I have answered that question.

Mr. BUNN: He said it twice.

Mr. R. H. VOORHEES: The stenographer cannot take down a nod.

Q. You testified in this case before, didn't you, Mr. Lawrence?

A. Yes, sir.

458 Q. Now, I will ask you, Mr. Lawrence, if in the former trial these questions were not asked you, and if you did not make the answers that I shall read: "Question: Do you know where the train was when you went back into the diner on that trip?" Answer: "Yes, sir—not into the diner; I knew where the train was when I went forward the second time." Question: "You certainly went into the diner, and whether you went back to the

Pullman or not you don't recollect?" Answer: "I don't recollect. But I may have stopped and spoke to the boys in the dining-car." Question: "Now, when delivering that message, and you started back toward the front of the train again, have you any recollection where the train was?" Answer: "I remember where we was as quick as I stepped out on the first platform open." Question: "The first platform of the tourist-car?" Answer: "Yes, sir." Question: "Where was the car then?" Answer: "We were just leaving Pack River trestle." Question: "Going towards Spokane?" Answer: "Yes, sir." Question: "Who, if anyone, did you see on the platform at that time or meet any place along in the train?" Answer "No one." Question: "When you went through that platform into the tourist-car how long did you remain in the tourist-car?" Answer: "I passed right directly through it, right into the rear end of the day-coach." I will ask you if you gave that testimony before, Mr. Lawrence?

459 A. I don't know whether I gave that testimony before or not. But, if I did, it is correct. The first platform, if you will allow me to explain, we call the front platform of the tourist-car.

Q. I will come to that presently. You think this testimony is correct?

A. Yes, sir; I don't have no other story to tell.

Q. You think that is true, now?

A. Yes, sir, because I was—my memory was more clear then than it is now.

Q. Then, when the question is given here. "Now, when delivering that message, and you started back toward the front of the train again, have you any recollection where the train was?" Answer: "I remember where we was as quick as I stepped out on the first platform open"—what was the first platform open, Mr. Lawrence?

A. Just after I had stepped out of the tourist-car onto the platform, was the first platform open.

Q. Was not the rear platform the first platform open?

A. No, sir; that is not called the first platform of the tourist-car. The head platform is the first platform of the tourist-car, and it is regarded as such. If you have orders, or rules, or any orders from your conductor to obey, the first platform of the tourist-car is the head platform.

Q. So you did not mean to indicate that the first platform open was the first platform that you came to?

A. The other one—allow me to tell you, was a vestibuled platform ahead of this open. It was vestibuled. It was the first platform open. This one was open, and I stepped on to a vestibule.

460 Q. The dining-car was vestibuled?

A. That was vestibuled back, yes, sir. That was not open.

Q. And in going forward to the front end of the car, you mean to say then that the first platform open, or the first open platform was not the rear platform that you stepped onto from the dining-car?

A. That was the second open platform.

Q. Not the first one that you got to? It was the first one you got to, was it?

A. You did not ask me that question, did you? I answered you about the train as I would in speaking to my conductor of a platform of that car. If one of those platforms was broke, and it was the front platform, I would tell him the first platform, and you asked me.

Q. So that when you were asked, when you started back towards the front of the train, you remembered where you were as quick as you stepped out on the first platform open, you meant, then, that you had already walked across one platform open and through the tourist-car, and were on the second platform open?

A. I had come through the train that far.

Q. Yes, sir. You had gone through one platform open from the rear of the car, and were on the second platform that was open?

A. Yes, sir; this was the front, the first platform.

Q. That was not the first one you got to in coming through the train?

A. It was the first one on the train; it was the second platform, only I crossed the second platform first.

461 Q. Just answer my first question, Mr. Lawrence.

A. I have.

Q. Now, in the latter part of this testimony that I have read, the questioner goes on and says: "Question: "The first platform of the tourist-car?" Answer: "Yes, sir." Question: "Where was the car then?" Answer: "We was just leaving Pack River trestle." Question: "Going towards Spokane?" Answer: "Yes, sir." Question: "Who, if anyone, did you see on the platform at that time or meet any place along in the train?" Answer: "No one." Question: "Now, you went through that platform into the tourist-car; how long did you remain in the tourist-car?" What platform do you think was being referred to there?

A. That was coming from the diner?

Q. Yes, sir.

A. Well, that would be the rear platform?

Q. Yes, the one that you had just passed.

A. Yes, sir.

Q. And the one which you and the questioner were speaking about, wasn't it?

A. If that is what the question was, it certainly was.

Q. Yes, sir. Then you answered, "I passed right directly through it, right into the rear end of the day coach." Now, do you mean to say still, Mr. Lawrence, that you did not testify that as you stepped out onto the first platform of the tourist-car that was open, as you went from the rear of the train, you were just leaving the Pack River trestle?

462 A. I mean to say that I testified just exactly to the absolute truth as I knew it, and understood it.

Q. I am not asking you that, Mr. Lawrence; I am asking you whether or not you mean to say in the face of that record, that you did not testify at that time that as you stepped on to the rear plat-

form, open unvestibuled, of the tourist-car—I ask you if you did not before testify that you were just leaving Pack River trestle? A simple question, Mr. Lawrence. Did you or did you not so testify?

A. Oh, well, now, I don't understand you exactly.

Q. A very simple question, Mr. Lawrence; I will repeat it if you wish.

A. I don't understand exactly what you mean. I don't want to tell a lie about these things, understand, I want to testify exactly to what it is. And I want to understand it plain.

Q. Just answer my question, there is no need for long explanations. I ask you if in the face of the record that I have read here, whether you persist in saying that you did not testify on the former occasion that as you stepped off of the diner on to the rear platform open and unvestibuled of the tourist—if you did not testify that at that time you were rolling, passing off of the Pack River trestle?

A. If I did I misunderstood the question.

Q. You mean to say that you did not testify so?

A. If I testified—I don't know, sir—I say if I did testify, if it is there, I will say this much, that I misunderstood the ques-
463 tion when it was put to me; because it was the front, first platform next to the day-coach that I am speaking about, have reference to in regards to the frog?

Q. Now, Mr. Lawrence, you have had considerable interest in this case on behalf of the railroad, have you not?

A. Not the least in the world.

Q. Not a bit?

A. Not a bit, sir. I hope I never will, either.

Q. Now, Mr. Lawrence, I will ask you if, during the trial of this case, on the former occasion, in this court room—not in the court room but in the hall-way leading into the court room, you did not have a conversation with Mr. Carruthers who has testified in this case, in regard to his testimony in this case?

A. Yes, sir, I did.

Q. I will ask you, Mr. Lawrence, if you did not ask Mr. Carruthers why he was here?

A. Yes.

Q. I will ask you if you did not ask him if the railroad had subpœnaed him, or if he was to testify for the railroad?

A. I could not swear to that.

Q. You may have done so?

A. I might have done so.

Q. I will ask you if he did not reply to you that he appeared here because he was subpœnaed and for the plaintiffs?

A. That he replied to me that he was?

Q. Yes, sir.

A. I believe he told me so; I believe he did.

Q. I will ask you, Mr. Lawrence, if you did not then say to him, "If you consider your job worth anything you had better not testify against the railroad?"

464 A. I don't remember.
Q. Or words to that effect?
A. I don't remember of anything of the kind.
Q. Will you swear you did not say it, Mr. Lawrence?
A. Yes, sir, I believe I will.
Q. You will swear positively?
A. I think I can tell you exactly what that conversation was.
Q. I will ask you, Mr. Lawrence, if there was not a third party present at that conversation?
A. I don't know whether there was or not. I cannot swear to it.
Q. You don't know?
A. No, sir.
Q. Will you swear there was not?
A. As I said, I don't know; I would not swear there was not.
Q. That conversation was during the trial?
A. No, sir.
Q. When was it?
A. That was before the trial started.
Q. Just as the trial was starting here?
A. It was down on the sidewalk, I believe.
Q. Will you swear that it was not in the hallway here?
A. In the hallway?
Q. Yes, sir.
A. I did not meet him in the hallway; I will swear I met him down on the sidewalk.
Q. Will you swear you did not meet him in the hallway?
A. I have met him lots of times in the hallway.
465 Q. Will you swear that you did not have a conversation with him in the hallway, in which you stated to him, "If you consider your job worth anything, you had better not testify against the railroad," or that in substance?
A. Yes, sir; I will swear that I did not. That is a positive falsehood. That is what I will swear to.
Q. Now, Mr. Lawrence, I will ask you if you were in the courtroom on the day my associate counsel was making the opening statement in this case, at this trial?
A. Was doing what?
Q. Was making the opening statement in this case, just as the trial was beginning here.
A. Well, I cannot swear to that. I was in here, I think before he finished it; I ain't positive, but I think he was, though.
Q. Do you know Mr. Wickersham who testified here?
A. Do I know Mr. Wickersham?
Q. Yes, sir.
A. Yes, sir.
Q. I will ask you, Mr. Lawrence, if at that time, while the opening statement was being made, you and Mr. Wickersham were not sitting near each other, and if you did not——
A. Excuse me.
Q. Wait a moment, excuse me—and if you did not state to Mr. Wickersham, when my associate counsel stated what Mr. Wicker-

sham would swear to—I will ask you if you did not turn to him and say to him, "If you make your testimony as strong as that you are liable not to get back on the road," or words in substance to the same effect?

466 A. Did Mr. Wickersham say that I said that?

Q. I am asking you whether you said it or not, Mr. Lawrence.

A. I don't remember.

Q. Will you swear you did not say it, Mr. Lawrence?

A. I said I don't remember.

Q. Do you swear that you did not say it?

A. No, sir.

Q. No, sir. Now, you say, Mr. Lawrence, you went into the day-coach; do you know where you were when you got into the day-coach, going back from the rear end of the train?

A. Going back from the rear end of the train?

Q. From the rear end of the train.

A. Towards the head?

Q. Yes.

A. Do I know where I was?

Q. Yes.

A. Which time?

Q. The second time.

A. We was just about the side track, at the east side end of the Pack River—or the west end of the Pack River trestle.

Q. That was where the frog was? Was that after you got into the day-coach, Mr. Lawrence?

A. You asked me after I was into the day-coach, I understood you.

Q. Yes, sir.

A. Yes, sir; when I was on the platform we struck the frog that was at the end of the sidewalk.

Q. Which platform?

A. The one next to the day-coach.

Q. The tourist platform?

A. Yes, sir.

467 Q. Yes, sir. From then on—you stopped there as you stated, and leaned on the railing?

A. Yes, sir, I caught hold of the railing.

Q. And looked at the lake?

A. Yes, sir.

Q. During that time the train was rolling on?

A. Yes, sir.

Q. You then walked across the platform, opened the door of the day-coach, walked in?

A. Yes, sir.

Q. Closed the day-coach?

A. Yes, sir.

Q. Was there a vestibuled door to that car, that is, an inner swinging door?

A. Yes, sir.

Q. You opened that?
A. Yes, sir.
Q. And passed in?
A. Yes.
Q. Up the car to what point?
A. I did not pass up the car at all, I said I sat down on the seat on the right hand side as I stepped inside.
Q. Is that right next to the door?
A. Next to the swinging door; yes, sir.
Q. Is there no space between it and the partition in which is the swinging door?
A. Between the seat and the——?
Q. Yes, sir, and the partition between.
A. No, it is fastened right up against—goes right up against the end of the car inside.
Q. And you sat down in that?
A. Yes, sir.
Q. And as you sat down you noticed a gentleman coming down the aisle?
A. Yes, sir.
Q. And his appearance corresponds with what you were afterwards told was the appearance of Mr. Adams?
A. Yes, sir.
468 Q. Where was the conductor at that time, Mr. Lawrence?
A. That was my second trip back?
Q. Yes, sir.
A. I could not say exactly where the conductor was then.
Q. Would you say he was in the car?
A. He was in one of the cars, some of the cars.
Q. Not in the day-coach?
A. I didn't notice him if he was.
Q. He might have been, and he might not have been?
A. Might have been and might not have been.
Q. Just as apt to have noticed him in the day-coach, weren't you, as Mr. Adams?
A. Well, he was the only man standing in the day-coach—or walking up the aisle.
Q. Mr. Adams?
A. Yes, sir.
Q. The only man standing in the day-coach?
A. He was the only man at least that was coming up the aisle.
Q. Do you stick to the fact that he was the only man standing in that day-coach?
A. Coming up the aisle, certainly; and the fact that he was the only man that I noticed; I am not going to swear that there was not anybody got up or stood up in there at that time.
Q. Was there anybody else in the aisle?
A. They may have got up after he passed.
Q. Will you swear the conductor was not in the aisle?
A. The conductor?
Q. Yes, sir.

469 A. No, I won't swear to that.

Q. But he might have been and you not seen him; but you did see a man you thought was Mr. Adams?

A. I don't think he was.

Q. Are you pretty positive about that?

A. Yes, pretty positive; very positive; I don't think he was.

Q. You would have been very apt to see him, wouldn't you, if he was there?

A. Well, I was liable to.

Q. Yes, where was the frog you speak of, with reference to the Pack River station-house?

A. Well it is some time since I have been there, and it is very close to the trestle—as I said it might be one hundred feet, it might be one hundred and fifty feet, something like that, from the end of the trestle. The siding is on the left-hand side coming this way.

Q. I did not ask you the siding, I asked you as to the station-house the section-house.

A. They was close together; I couldn't say how far.

Q. Just about the length?

A. The section-house is on one side and the side-track on the other.

Q. And they are about together?

A. They are so close, I would not say they are directly opposite; very close.

Q. Quite close?

A. Yes, sir.

Q. You said the frog might be two hundred feet from the trestle.

A. It might be, I did not say it was, I said it might be.

Q. It might be?

A. Yes.

470 Q. Now, you stated that Mr. Long—that you spoke to Mr. Long about Mr. Jeannot's horns?

A. No, sir, did not say that; I beg to differ; I said Mr. Long spoke to me.

Q. Oh, excuse me. I knew there was a conversation with regard to the horns. Didn't you speak to him in return?

A. He asked me how the horns were, and I told him, yes, sir.

Q. Yes. Then you did speak to him, didn't you? Now, Mr. Lawrence, if there was a gate or a bar or a chain guarding the sides of those platforms, would you hear the sound of the running of the train just as loudly as if there was nothing there?

A. Yes, sir, yes, sir.

Q. The gate or the chain or the bar, the iron bar or object of wood across there would not interfere with the sound at all, would it?

A. No, sir.

Q. Now, you say, Mr. Lawrence, that you noticed nothing out of the usual until you were running into Spokane, and there you noticed high speed?

A. Yes, sir, I noticed very high speed then.

Q. That was the first high running that had been called to your attention?

A. Yes, sir, real fast running.
Q. Had not noticed anything out of the usual whatever?
A. Nothing alarming, no, sir.
Q. I am not speaking of alarming, I am speaking of usual, Mr. Lawrence.
A. Our time is pretty fast there all along.
471 Q. I am speaking of usual, Mr. Lawrence. I asked you if you had noticed anything out of the usual order of running, up to when you were running in to Sandpoint?
A. No, sir, not until we were going into Sandpoint?
Q. What was your schedule rate of running along between Hope and Sandpoint, Mr. Lawrence?
A. That I cannot swear to.
Q. Then you don't know what the usual was, do you?
A. I know from my experience as a railroad man, riding on the train, the time we usually made.
Q. And this was about the time you usually made, up to the point you ran into Sandpoint, when you were running faster?
A. When we were running on a late train, yes, sir.
Q. And then you think you were running what? What was the rate of speed you think you had reached?
A. At what place?
Q. At Sandpoint, when you reached Sandpoint.
A. I think we were close to sixty miles an hour two or three miles the other side of Sandpoint.
Q. That is east of Sandpoint?
A. Yes, sir.
Q. And two or three miles east of Sandpoint is the first time your attention had been attracted to the speed?
A. Yes, sir.
Q. Now, you say the stop at Rathdrum was very short; do you know what that stop was?
A. I did not take it, no sir.
Q. Haven't any idea in minutes?
A. Well, I should say a couple of minutes, maybe a little more, maybe a little less.
472 Q. Where was it, Mr. Lawrence, that that run was so fast that you could not time them by keeping track of the click of the rails?
A. This side of Rathdrum.
Q. This side of Rathdrum?
A. After you get over that first grade, this side of Rathdrum.
Q. How far is that from Rathdrum?
A. Well, I don't know exactly; it is, let us see, I should judge it was—I would have to just guess at it, I never paid any particular attention.
Q. Well, we don't want any guessing. Now, you say you gave the rate of speed from Cocolalla to Rathdrum; what was the rate of speed from Cocolalla to Rathdrum?
A. It was fast running; good fast running.
Q. What, in miles?

A. Well, some of the time it was faster than others.

Q. Can you name it in miles; how much per hour?

A. Well, I told you I tried to take it once and could not count, at one time; I could not say exactly; I could not tell exactly; nothing alarming.

Q. Was that between Cocolalla and Rathdrum you could not count?

A. Between Cocolalla and Rathdrum?

Q. Yes, sir.

A. No, sir, I said when I tried to take it, they was this side of Rathdrum.

Q. Exactly. I am asking you between Cocolalla and Rathdrum?

A. Well, I say I don't know.

Q. You don't know what the speed was there?

473 A. Well, I know it was pretty fast, very fast.

Q. When did you begin to run from Helena to Spokane, Mr. Lawrence?

A. From Helena to Spokane?

Q. Yes, sir.

A. The run was changed—the division was changed while I was out in Oregon at my father in law's. I spent the month of October——

Q. Wait a moment, I do not want family history. I would like to have you tell me how long you were running from—when you began to run from Helena to Spokane?

A. I commenced in November.

Q. Of what year?

A. Of 1898.

Q. 1898, that year?

A. Yes, sir.

Q. The first of November, or the last of November?

A. Well, now I don't know just exactly now. I won't swear to that until I would look it up to find out.

Q. How long had you been running from Hope to Spokane?

A. Well, that is what we are talking about.

Q. I asked you how long from Helena to Spokane?

A. Well, we always run from Helena, always run from Helena, that has been my terminal, with the exception of one summer I ran into Butte.

Q. Wait a moment. When did you begin to run from Helena to Spokane, Mr. Lawrence? You were not born a railroad man; you began sometime.

A. I have done lots of it, more than I ever will again. In November, somewhere along the first of November when I got back, I—they was running into Spokane.

Q. When you began to run from Helena to Spokane; what year?

A. Well, I don't just remember now.

474 Q. Was it 1897, 1896, or 1898?

A. I think it was in 1898.

Q. In November of 1898?

A. I think so; or 1897, I would not—I cannot be positive about that, I don't remember; I don't just remember about that; I would not swear to it.

Q. Now, Mr. Lawrence, these trains that came into Helena on which you got, you got on them at Helena, didn't you?

A. Yes sir.

Q. Did they, generally, as a rule, come in there in the order in which you have testified this train was running?

A. Yes, sir.

Q. That was the usual and customary makeup of the train in all respects?

A. That was the usual makeup of the train.

Q. As it came into Helena?

A. Yes, sir; unless there was more cars in the train.

Q. Do you know where the trains came from, Mr. Lawrence?

A. I always supposed they came from St. Paul, but I could not swear to it.

Redirect examination:

Q. About how long had you been running from Hope on into Spokane when this accident occurred, where Mr. Adams lost his life?

A. Well, I cannot tell exactly, not now; I can by looking—get my day-book.

Q. What I was trying to find out is whether a few days or a few weeks.

A. Oh, no, I had been running quite a while.

475 (Examined by a JUROR:)

JUROR: I would like to ask you a question, Mr. Lawrence. In the course of your duty as brakeman you often had to get on and off the train whilst in motion. What is the highest rate of speed a train can be moving at when you can safely get off?

A. When I can safely get off?

Q. Yes.

A. Oh, twelve or thirteen miles an hour.

Q. Twelve or thirteen?

A. Yes.

Q. Do you think you could safely get off at twenty?

A. Well, I would not like to, a heavy man like I am.

(Excused.)

R. K. KELLER, testified:

Direct examination.

(By Mr. THOMPSON:)

Q. Mr. Keller, state your full name to the jury.

A. R. K. Keller.

Q. Where do you reside?

A. Grand Forks, British Columbia.

Q. What is your business?
A. Hotel business.
Q. How long have you been in that business?
A. About going on seven months.
Q. What was your business prior to that time?
A. Dining-car conductor.
Q. On what road?
A. Northern Pacific railroad.
476 Q. How long had you served as a dining-car conductor?
A. Eight years.
Q. On what lines?
A. Northern Pacific.
Q. On the same line?
A. Yes, sir.
Q. What was your run as dining-car conductor?
A. Usually from St. Paul to Portland, Oregon.
Q. Were you running as such dining-car conductor during the year 1898?
A. Yes, sir.
Q. And from the same place, from St. Paul to Portland?
A. Yes, sir.
Q. How were those dining-cars at that time constructed, whether with vestibuled platform or without them?
A. They had the narrow vestibule; not the vestibuled platforms.
Q. Narrow vestibule. And how was the dining-car usually placed in the train—located in the train?
A. Well, that depended a good deal on the number of cars in the train. Usually right behind the tourist.
Q. And what cars were usually behind the dining-car?
A. Standard sleepers.
Q. You mean by that the Pullman sleepers?
A. Pullman sleepers, yes, sir.
Q. How many of those tourist sleepers were usually carried in each train?
A. All the way from one to four.
Q. What is the fact as to whether or not each train always had as many as one?
A. Always had one, yes, sir.
Q. In your duties as dining-car conductor, I will ask you
477 to state to the jury what the fact is as to whether the people in the tourist-car were permitted to use, and whether as a matter of practice they did use the dining-car and its service?
A. They did use the dining-car, and were permitted to use it.
Q. How was that used, whether by men only, or men, women and children?
A. By all classes that patronize the tourist-car.
Q. I will ask you to state what the fact is as to whether they used the service of the dining-car in any other way than taking meals therein?
A. Why, during the meal hours they would quite frequently come in for a cup of coffee, or a cup of tea, or a glass of milk; if babies

were on the train, of course, we would accommodate them whenever we could. And of course men with women and children would come there at meal hours.

Q. Did women come by themselves for those things?

A. Usually; when there wasn't anybody else with them.

Q. I will ask you what the fact is whether on passing through that car into the dining-car they had or had not to pass the open platform of the tourist car?

A. They did have to pass it.

Q. What inconvenience or trouble did you ever have from that direction?

Mr. R. S. VOORHEES: I object to that, if you are asking what trouble he ever had.

Q. Well, what trouble the passengers had.

478 Mr. R. H. VOORHEES: I object to that; he does not know what the trouble had by the passengers was. You could ask him if they complained to him about anything?

The COURT: I overrule the objection. He can tell what he knows about it, if he knows anything.

(Exception allowed plaintiffs.)

Q. (Question read.)

A. None that I know of.

Q. Now, I will ask you if you know how those tourist-cars are constructed, with reference to the use by the passengers of any conveniences there are, whether there is a range, cooking range, etc.?

A. Do you want to know where the cooking range is set?

Q. Yes, simply how it is located, and what it is.

A. Well, there is a range in the end of the tourist car? always there is a range; and they are for the use of the passengers in that car.

Q. What, if you know, becomes of the debris of the meals, and things of that kind, the waste of the cooking in there?

A. I don't know what becomes of all of it, but I have seen a good deal of it thrown out of the doors on the platforms.

Q. What do you know, if anything, on the 13th day of November, 1898, as to the makeup of the train in which that car was located?

A. At what point?

Q. Well, coming west, we will say, from Hope, Idaho.

A. The makeup of the train from Hope, Idaho?

Q. Yes, if you know.

479 A. My recollection, it was the usual makeup of the eight-car train.

Q. What was the usual makeup of the eight-car train?

A. The mail, baggage, express, smoker, first-class coach, tourist-car, diner and standard-sleeper.

Q. Now, when you say usual makeup, I will ask you to state to the jury what the fact was, up to that time, whether that order was universal, or whether it varied at some times?

A. At that time or prior to it?
Q. Well, along about that time, and for some time prior.
A. Well, at that time, and taking a few years prior, the makeup was always the same, with the exception of having other cars.
Q. For a few years prior to that time?
A. Yes, sir.
Q. I will ask you to state to the jury if you recall leaving Hope, Idaho, on the 13th day of November, 1898, for Spokane?
A. I do, yes, sir.
Q. Who was the conductor in charge of your train that day?
A. Sam Long?
Q. Do you know who the engineer in charge was?
A. I know now; I didn't know at the time—well, I did at the time, too, come to think about it.
Q. You did know who the conductor was at that time?
A. Yes sir; and the engineer also.
Q. The engineer also. Do you have any recollection yourself as to the time when you left Hope, what time in the evening it was?
A. Not exactly, no, sir.
480 Q. Do you know whether or not it was light at the time you left Hope?
A. It was, yes, sir.
Q. How far had you proceeded from Hope before any one entered your car to whom your attention was drawn?
A. How far had we proceeded?
Q. Yes.
A. Well, immediately after leaving Hope, or a few minutes afterwards, I went back into the standard sleeper.
Q. Well, what if anything induced you to leave the standard sleeper after you got back there?
A. Well, getting around near dinner; we generally go through the train to see how many people were on, and call them or size them up to see how many we will have for dinner.
Q. And you had gone back into the standard sleeper?
A. Yes.
Q. Now, what induced you to leave the standard sleeper and go forward again?
A. The waiter came back there and said, "A gentleman wants to see you."
Q. When you state that the waiter came back, was that one of the colored waiters?
A. One of the colored dining-car waiters.
Q. What did you do when that notification was given you?
A. I immediately returned to the dining-car.
Q. When you got into the dining-car just state to the jury what you saw on entering the dining-car.
481 A. As soon as I got into the body of the car, why there was a gentleman sitting in one of the sections.
Q. Do you know what section that was?
A. Section 7, if I recollect.
Q. Which side of the car is section 7 on?

A. On the south side, the left-hand side.

Q. When you got through the door and got inside the car what if anything did you do?

A. I asked him—he saw me, or we both saw—he stepped forward towards me.

Q. What if anything did he have in his hand, do you know?

A. Well, twenty-five cents in his hand, which he handed me for the cigars.

Q. You had been notified, had you, what he wanted before you came in?

A. Yes, sir.

Q. State to the jury what you did, in finding the cigars for him?

A. Well, as I entered the car he approached me; and I asked him what he wanted. Of course, I had already been informed what he wanted, but to make sure I asked him. And he told me he wanted a couple of good cigars, and I asked him the kind, whether it was light or dark he wanted; got the cigars; and when he took hold of them he gave me the quarter and went out.

Q. What sort of a looking man was he?

A. Smooth faced, short, heavy-set, ruddy complexioned.

Q. What did you notice about him as he walked forward? Did you notice any actions, any peculiar motions?

A. No, sir.

482 Q. What, if anything, was the condition of the train at that time, as to whether it was running smoothly or otherwise?

A. It was on a very crooked piece of track, a little ways out of Hope, the track is crooked along there.

Q. Do you know whether you had passed by the Pack River trestle at that time?

A. I could not say positively, I think we were, though.

Q. You think you had passed off of it?

A. Yes, sir.

Q. What would make you think it was crooked track?

A. Well——

Q. Anything attracted your attention at that time, or simply your knowledge that it was crooked?

A. When you are on a train you can always tell when you are running over a crooked track.

Q. How can you tell when you are riding on the cars?

A. It has a tendency to throw you one way or the other.

Q. You noticed at that time that you were running over a crooked track?

A. Yes, sir.

Q. Did you notice anything in his motion that indicated that to you, or simply the motion of the train?

A. That would be hard to say; the motion of the train would indicate.

Q. Just state to the jury what you noticed, if anything, in what he did in going to the front end of the car?

A. As he turned to go out I noticed he had pretty hard work to

go through the car; I noticed he had to assist himself either
483 on the seats of the car or the tables through the dining-car, or do both—I don't know which one he took hold of.

Q. Did he take them in one hand or both hands?

A. Both, on his way out.

Q. When he went forward, did you see him until he got entirely out, or did he go into the vestibule?

A. I watched him all the way out of the car, knowing that he had a hard time to get through, I watched him all the way.

Q. What were you doing, standing up or sitting down?

A. I was standing right where he gave me the money.

Q. What difficulty did you have in standing?

A. Not any. Of course, I am accustomed to it.

Q. You don't know whether he was accustomed to the motion or not?

A. No.

Q. When he went out did he say anything?

A. He did not have a word to say, no, sir.

Q. When he passed the vestibule could you see him afterwards?

A. I could not see him after he closed the door.

Q. After he closed the door did you ever see him afterwards?

A. No, sir.

Q. You never saw that gentleman afterwards?

A. No, sir.

Q. What kind of a hat did he have on?

A. I cannot say; it was a dark hat; I cannot say exactly.

Q. You don't recollect whether it was a soft hat or derby hat?

A. No, I do not.

484 Q. What other gentleman was there about that time of the same shape and form that bought any cigars from you?

A. That was the only cigars I sold that afternoon after we left Hope.

Q. So that if Mr. Adams actually bought any cigars from you, this was probably the man?

A. Yes, sir.

Q. Now, can you give the jury any real definite idea as to how far you had passed off of Pack River trestle at that time, or whether this was upon the first curve or later on the track?

A. I could not.

Q. You have no definite recollection on that question?

A. No, sir.

Q. Did not note anything at the time?

A. No, sir.

Cross-examination.

(By Mr. R. H. VOORHEES:)

Q. You state that as Mr. Adams, or the gentleman that has been described by you, was going out of the car, it was a curvy track?

A. Yes, sir.

Q. And he steadied himself on the tops of the chairs; that is customarily done in moving along a car where there are curves?

A. Why, some people do it and some don't.

Q. Now, Mr. Keller, you say that you were in the sleeping car at the time that the porter came to you. Whereabouts in the car were you?

A. Well, that I could not say exactly whereabouts I was.

485 I may have, I know I was either returning—I think I was returning.

Q. You and he met and he told you what was wanted in the dining-car?

A. Yes, sir.

Q. The train was rolling on, of course, during that time. Then you walked from where you were in the sleeper forward to the front of the sleeper—that is a little narrow way off to the side of the car, isn't it?

A. In the sleeper?

Q. Yes, sir.

A. Yes, sir.

Q. Just a little narrow way; you walked through that; probably that width (indicating)?

A. Just about that width, yes, sir.

Q. A place where you cannot go very rapidly except—well, you might if you are accustomed to it.

A. I can go through that pretty fast myself.

Q. You are a thin man, anyhow. And you went there, and turned the corner and opened the door, walked out, closed the door, walked across the platform of the sleeper, across the platform of the diner, opened the dining-car door and stepped in there, closed the dining-car door, am I right so far?

A. All except opening the doors; the waiter preceded me and opened the doors and I closed them.

Q. You closed them?

A. Yes.

Q. Then you came into the diner. When you stepped into the diner, there is a narrow passage off to your left there, isn't there?

A. Yes, sir.

Q. Along by the kitchen department, that is in that end of the car?

A. Yes, sir.

486 Q. You walked through this little narrow space; is there a door at the end of that narrow space, or do you step right through into the body of the car?

A. A door at which end?

Q. As you go through toward the front of the car?

A. No, there is no door; a regular open.

Q. You stepped into the car. Now, about where in the car was Mr. Adams; about the center?

A. *I* little beyond the center, towards the front.

Q. A little beyond the center toward the front. And after you

had gotten by the kitchen department and into the body of the car, was it then that you and Mr. Adams met?

A. When I got into the center of the car—he could not see me until I got to the center.

Q. And then he got up after you got to the center, and came towards you?

A. Yes.

Q. And asked you for the cigars?

A. Yes, sir.

Q. Then you turned and went to your cigar-locker. Hadn't you passed your cigar-locker at that time?

A. Well, I could almost reach it from where I was.

Q. Then you turned to your cigar-locker. Did you keep that locked?

A. Always locked.

Q. You took your keys out?

A. Yes.

Q. And picked the particular key that you had for that; did you have a bunch?

A. Had a bunch of them.

Q. Picked the proper key to the locker, and unlocked it. And then you selected a box of cigars from the various boxes you had in there?

A. Yes, sir.

487 Q. You had several boxes?

A. Several varieties.

Q. Several varieties; and you selected the variety he wanted and brought it back to where he was standing?

A. Yes, sir.

Q. About where you had met him, wasn't it; and allowed him to select his own cigars?

A. I didn't go to that formality; I brought him the two cigars.

Q. Brought him the two cigars and handed them to him? Then he handed you the piece of money?

A. Yes, sir.

Q. And turned to go out. Then he walked from the center of the car to the front door of the diner?

A. Yes, sir.

Q. Walking slowly I suppose, as he steadied himself?

A. Not very rapidly.

Q. What?

A. He did not go out very rapidly.

Q. No, went slowly. Went slowly to the front of the car, steadying himself as he went; opened the door?

A. Yes, sir.

Q. Went out and closed the door, and that is the last you saw of him?

A. Yes, sir.

Q. And all this time the train was rolling on?

A. I did not notice it stop.

Q. You don't know how long Mr. Adams had been sitting there, do you?

A. No, I don't.

Q. The porter did not tell you?

A. He could not have been sitting very long, because I had only went out a few minutes and while I was out he came back for me.

488 Q. The porter was a colored porter?

A. A colored waiter, yes, sir.

Q. I mean a colored waiter. You don't know of your own knowledge what trouble passengers had crossing open platforms, do you, Mr. Keller?

A. What trouble they had?

Q. Yes.

A. I never had any intimated to me that they had any.

Q. You had no knowledge of what they had?

A. No, sir.

Q. In other words, you were not looking at the open platforms for the purpose of knowing whether the passengers had trouble there or not?

A. Well, I should say I have, yes, sir.

Q. Have you?

A. Yes, sir.

Q. While the train was running along?

A. Yes, sir.

Q. And at curves and such places?

A. It would be such places as that that I would notice it.

Q. Were you standing on the open platforms for that purpose?

A. No, sir, I have not. I have noticed the open platforms, though, when the trains have been running along, and noticed people crossing them.

Q. And you never saw anybody thrown off?

A. No, sir.

Q. Now, did the dining-car remain in the same position all the time on those trains?

A. Most of the time; very seldom changed.

489 Q. And the makeup was always the same?

A. Well, it varied from time to time; but that present time it was always the same.

Q. Where did you come from, Mr. Keller, on that car?

A. Where did I come from?

Q. Yes, on that train.

A. From St. Paul.

Q. Was the train made up at St. Paul?

A. Yes, sir; all overland trains are made up there.

Q. Yes, sir; and the diner—was the makeup of that train the same from St. Paul to Portland?

A. The makeup of the train continued the same?

Q. Yes.

A. With the exception of cars put in at different places.

Q. Well, this particular train that I am speaking of?

A. We sometimes picked up a sleeper, or dropped it off at Fargo or other points.

Q. This particular train?

A. I don't know whether this particular train did or not.

Q. I am speaking of the particular train; do you remember?

A. They may have had other cars on, but they didn't have it after we left Hope.

Q. You don't remember?

A. Not east of Hope.

Q. Did you carry the diner clear through?

A. Yes, sir.

Q. In the same position?

A. In the same position in the train.

490 Q. And the makeup from the rear sleeper to the front was the same from St. Paul?

A. Yes, sir.

(Excused.)

(Whereupon an adjournment was taken to 9:30 a. m., to-morrow.)

DECEMBER 5TH, 1900—9:30 o'clock a. m.

J. A. HUMPHREY testified as follows:

Direct-examination.

(By Mr. THOMPSON:)

Q. Where do you reside, Mr. Humphrey?

A. I reside at Mabton.

Q. In this State?

A. In this State, yes, sir.

Q. What is your occupation?

A. I am agent for the Northern Pacific Railway Company at that point.

Q. What length of time have you been in the service of the Northern Pacific?

A. I have been in the service of the Northern Pacific about ten years.

Q. In what capacity?

A. Telegraph operator and agent.

Q. What position did you occupy on the 13th day of November, 1898?

A. I was agent at Hope, Idaho.

Q. I will ask you to state to the jury how long you had that agency at Hope, Idaho?

A. I had been there from about the first of the year 1898 until about December of the same year.

Q. Almost a year's service at that point?

491 A. Almost a year, yes, sir.

Q. I will ask you to state to the jury what the practice was, if you noticed, in the passage of trains by your station, passenger trains going west, to carry tourists, sleepers or otherwise. What was

the fact as to whether they did or did not carry tourist sleepers, the passenger trains going west from your station?

A. That was the understanding that they carried tourist sleepers.

Q. I do not ask for your understanding, but whether you saw them or did or did not notice them?

A. Yes, I have seen them.

Q. Do you know what the practice was as to its universality, whether it was on all passenger trains, or only a portion of them, or what the fact is?

A. I don't know.

Q. You don't know that?

A. No.

Q. Do you recall the passage of the train west late in the afternoon of the 13th day of November, 1898?

A. I do.

Q. Do you recollect what sort of a train that was, the number of cars, etc.?

A. No, sir, I don't.

Q. Did you have any knowledge at the time it passed as to who was the conductor on that train?

A. No, I don't remember.

Q. What hours did you pass at your office as agent at Hope, Idaho, during that time, the 13th day of November, 1898, how many hours and what were those hours?

492 A. I could not say just to that day; I could tell as to my general hours.

Q. Well, what was usual with you?

A. I generally come on to work at 7 o'clock in the morning and quit all the way between 5 and 7 in the evening.

Q. What duties did you have to perform with reference to that passenger train that passed there in the afternoon?

A. I had to attend to the express, is about all.

Q. What did you have, if anything, actually to do on that particular day with regard to it, whether you did have any express or not?

A. I remember I was at the express-car with the same, I don't remember whether I changed express with the messenger or not.

Q. What did you have, if anything, to do with the mail?

A. I had railroad mail, that would always go to the express messenger.

Q. Do you recollect the fact as to whether that train was or was not late when it reached Hope?

A. I remember it was late.

Q. You don't recall the exact hour?

A. No, I don't.

Q. Were you acquainted with Mr. Jay H. Adams in his lifetime?

A. No, sir.

Q. Were you acquainted up to that time with Mr. George Gabbart?

A. No, sir.

493 Q. Do you know Mr. Gabbart now?

A. I have seen him, yes, sir.
Q. You have seen him testify as a witness in this case, have you?
A. Yes, sir.
Q. At this trial?
A. Yes, sir.
Q. What is the fact as to whether you saw him at the former trial when he testified?
A. No, I did not.
Q. I will ask you to state to the jury what you know, if anything, of seeing this same gentleman, Mr. Gabbart, at the station at Hope on this date?
A. I saw a man of his description.
Q. From having seen him here, can you state to the jury what the fact is as to whether it was him or not?
A. I believe it was him.
Q. Who was with him at that time?
A. There was another gentleman with him.
Q. Just describe that other gentleman to the jury. Turn to the jury and tell them what kind of a looking man he was?
A. He was a man of ordinary height, I should judge about as tall as I am, and a man very fleshy and very large abdomen; he was a very fleshy man.
Q. What was the fact as to his wearing beard or being smooth shaven or what?
A. He had a smooth face.
Q. What kind of hat did he have on?
A. I could not say now.
Q. What was his appearance as to being pale or flush-faced, or what was the fact?
A. Yes, he was florid, had kind of a ruddy face.
494 Q. What, if anything, did you notice that he and Mr. Gabbart, or the gentleman that you think was Mr. Gabbart, were doing?
A. They were boarding the train.
Q. Where did they board the train, if you recollect?
A. They boarded the train directly between the ticket office and the telegraph office.
Q. What platform did they get on, if you recollect?
A. They got on the front end of a car.
Q. Do you recollect what car it was?
A. No, sir.
Q. Whereabouts was that car located with reference to the position of the smoker, of the day-coach, of the tourist-car, or the dining-car; as near as you can tell the jury, whether it was ahead of the dining-car or behind it?
A. I could not tell a thing about that.
Q. You did not notice?
A. No; I did not notice.
Q. Did you notice what the fact was as to whether the platform on which they took the train was or was not a vestibuled platform?
A. It was not a vestibuled platform.

Q. Who went up first?
A. Mr. Adams.
Q. When you say Mr. Adams, what gentleman do you mean?
A. I mean the man whom I described as the short, fat man.
Q. What made you think it was Mr. Adams; did you learn anything afterwards that led you to think it was Mr. Adams?
495 A. I asked some person who that little fat fellow was, and they said he was the Great Northern attorney from Spokane.
Q. You did not know him personally at the time?
A. No, sir.
Q. What was there, if anything, in his actions that attracted your attention to him, if there was anything?
A. No; I did not notice anything.
Q. In boarding the train you said I believe Mr. Adams went up first?
A. Yes, sir.
Q. When he had gone up upon the platform, which you say was an unvestibuled platform, did you notice which way he turned, whether into the unvestibuled car or forward into a vestibuled car?
A. I did not notice.
Q. What did you notice, if anything, as to whether the other gentleman followed him?
A. Yes, I noticed he followed him.
Q. What did you notice, if anything, as to either assisting the other?
A. I noticed the gentleman who got on last took the first gentleman's arm.
Q. Do you recollect which arm?
A. Took his left arm.
Q. Took his left arm?
A. Yes, sir.
Q. Just describe to the jury what he did in taking his left arm, if anything?
A. As they came up to the platform of the car to get on he took him under the arm, and this fat gentleman took hold of the
496 iron with his right arm and he took him by the left arm, and he got on, and he got on after him.
Q. Who else did you notice boarded the train upon that same platform, if any one at all?
A. I did not notice; there was always a great number of people getting off and on there to eat.
Q. You didn't notice any?
A. No.
Q. Had you seen this gentleman there before during the day?
A. Not that I remember.
Q. Had you seen him at the time or just prior to the train coming up, on the platform?
A. No.
Q. You don't know how long he had been there, or when he came, or anything of the kind?
A. No.

Q. No knowledge on that point at all?
A. No.
Q. When you say that he took him by the left arm, or under the arm, I wish you would just describe to the jury just where he put his hand on, just what motion he made, if any?
A. He took him up under the arm, I should judge—well, up under the arm—I don't know of any other way to describe it.
Q. What did he do, if anything, as to assisting him on the train?

Mr. R. H. VOORHEES: He has already stated. The matter is immaterial, anyhow. I object as immaterial.
(Objection sustained.)

Q. Did you ever see that gentleman afterwards that boarded the train, the short, heavy gentleman?
A. I did.
497 Q. When, and where?
A. I saw him the next day at Hope on a car.
Q. State whether he was in life then or not?
A. He was not.
Q. Where had he been brought from, do you know, or did you aid or assist in any way about the care of his body?
A. I did not.
Q. Who was in charge of the body that you saw—that you say was the same man?
A. Conductor Dikeman was in charge of the train; I don't know, I presume he had charge of the body, but I don't know anything about it.
Q. What other persons did you see there with the body at that time besides Conductor Dikeman?
A. I don't remember in particular; I remember seeing some other people around there viewing the body.
Q. Did you examine the body to see what wounds or anything were on it?
A. I just noticed——
Q. (Interrupting.) Where were the wounds?
A. I noticed the wound on the forehead, the left side of it.
Q. Whereabouts on the forehead?
A. About half way between the hair and the eyebrow.
Q. What other wounds, if any, did you observe?
A. I noticed some scratches upon his wrist and arm.
Q. On which hand, do you recollect?
A. I believe it was on his right hand.
Q. What other wounds, if any, did you notice?
A. I don't remember any.
498 Q. Did you make a close examination, or did you just see the body lying there?
A. No, only as an observer.
Q. Were there many persons around there?
A. Yes, there were persons coming and going.
Q. Do you know Mr. Albert Allen, the attorney?
A. No, sir.

Cross-examination.

(By Mr. R. H. VOORHEES:)

Q. You stated that a great number of people were getting off and on there all the time?

A. Yes, sir.

Q. Fat men and thin men and short men and long men and smooth-faced men and bearded men are always getting on and off there?

A. All kinds of people traveling, getting on and off there.

Q. You stated that the gentleman you saw getting on there at Hope was about as tall as you are?

A. I should judge about as tall as I am, five feet eight and a half.

Q. And the gentleman that was with him, what was his character in appearance?

A. He was a tall, bony looking man, as I thought at the time.

Q. What kind of beard had he?

A. I don't believe he had any beard.

Q. Smooth-faced also?

A. I think so.

Q. Sure of that?

A. No; I am not; I think so, though.

499 Q. Sure that the other man was smooth-faced, are you, you saw him after he was dead?

A. Yes, sir.

Q. You say there was nothing that attracted your attention to Mr. Adams specially. How was it you happened to note all of these details about his getting on the car?

A. It had been a long time since I had seen a man so fat and peculiarly shaped as he was, and that is why it drew my attention.

Q. Just the shape of the man?

A. That is all.

Q. Then because of the shape of the man you noted down in your memory all of these little details about him boarding the car?

A. No; I did not until after I had seen him the next day.

Q. How do you know the car was unvestibuled that he got on?

A. I could hardly mistake that; I could see right through, right across the car, daylight through.

Q. Which side were you standing on, the lake side, toward the lake or the side from the lake?

A. I was standing facing the lake.

Q. Facing the lake?

A. Yes, sir.

Q. How high is the platform there?

A. Oh, I never measured it; I don't know.

Q. Could you see through to the lake on the other car also that was adjoining it?

A. I don't remember.

Q. You don't know what kind of a car that was?

500 A. No, sir.

Q. It was right up against the platform that he got on, wasn't it?

A. I presume it was; I did not notice.

Q. You could not see one without seeing the other, could you?

A. Not very well, no, sir.

Q. You don't know whether you could look through that or not?

A. No, sir.

Q. You have not any idea whether that was vestibuled or not?

A. No, I have not.

Q. Yet you are sure the one right adjoining was not vestibuled?

A. Yes, sir; I am.

Q. If the two doors of the vestibule had been open, Mr. Humphrey, couldn't you see right through to the lake ahead?

A. Yes, sir; I could.

Q. So that the reason why you think it was not vestibuled, because you could look through to the lake, would hold equally good with a vestibuled platform if the doors were open, would it not?

A. No.

Q. Couldn't you see right through to the lake?

A. Yes; I could.

Q. Exactly, just as well as if the car had no vestibule on?

A. Just as well.

Redirect examination:

Q. Do they ordinarily at that place open both doors of the vestibule, the one towards the lake and the one towards the platform?

501 Mr. C. S. VOORHEES: We object to what was ordinarily done. The question is what was done upon that day?

Q. Do you know whether it was done that day or not?

A. I don't know.

Q. Now, in looking at an open platform of an unvestibuled car and at the open door of a vestibuled car a markedly different appearance is presented, is there not?

A. Yes, sir.

Q. Describe to the jury the difference between the two.

A. I don't know that I can describe it; I know it when I see it; it is not such a wide place through with a vestibuled car as there is in an unvestibuled car.

Q. What is the fact as to whether in an unvestibuled car the whole space and end of the car is entirely out of the way?

A. I don't understand your question.

Q. What I mean is, in an unvestibuled car, what is the fact as to whether the whole rear end of the coach is open?

A. Yes, sir.

Q. Now, in a vestibuled car what is there open besides the narrow door in the side of the vestibule when it is open; is there anything else open except the narrow door?

A. No; I don't know of anything else being open; I don't think there is.

Q. The balance of the vestibule still remains there; does it not?
A. Yes, sir.
502 Q. So that, in looking through the door of a vestibuled car you would be looking through one narrow door and across to the other side, through a narrow door on the other side of such vestibule?
A. Yes, sir.
Q. While in looking across an unvestibuled car the whole end of the car is open?
A. That is so.
Q. Now, state to the jury what the fact is as to whether there would be any difficulty at all in noticing the difference?
A. No; there would be no difficulty in noticing the difference in the general appearance.
Q. Now, you say that you are five feet eight and a half inches tall?
A. Yes, sir.

Recross-examination:

Q. How tall did you say you were?
A. Five feet eight and a half inches.
Q. This difference that Mr. Thompson has called your attention to between vestibuled and unvestibuled platforms did not enable you to note what was the character of the adjoining platform at that time, did it?
A. No; it did not.

(Excused.)

G. W. HOWELL, testified as follows:

Direct examination.

(By Mr. THOMPSON:)

Q. Mr. Howell, what is your business, and what has it been for years?
503 A. My present occupation is resident manager of the St. Paul & Tacoma Lumber Company.
Q. What was your business before you went into that company?
A. Telegraph operator and station agent for the Northern Pacific railroad.
Q. How long have you served as such telegraph operator and station agent?
A. Ten years.
Q. On what portions of the line?
A. All the way from Portland to Helena.
Q. Where were you serving November 13th, 1898?
A. Sandpoint, Idaho.
Q. How long had you been serving there at that time?
A. About a month and a half.
Q. What were your duties as such telegraph operator?

A. To handle all the telegraph business for that station.

Q. What with reference to the running of trains?

A. I would stay between the hours of 7 a. m. and 7 p. m.

Q. What were your duties with reference to the running of trains, dispatching, with reference to the running of trains between those hours?

A. To handle all train orders addressed to them by the train dispatcher and to report the arriving and departing time of each train.

Q. You may state what the fact is as to your orders and your actual practice in doing that work accurately or otherwise?

504 A. As accurately as possible; always accurately.

Q. I will ask you to state what the fact is as to whether it was your duty to do and whether you actually did report the arrival and departure of those trains to the minute and second?

A. They were reported to the minute exactly.

Q. And to the second also, where a train passed, for instance, at—you say to the minute anyhow?

A. Yes, sir.

Q. Where were those dispatches sent to, when you would send them giving an account of the passing of a train by your station?

A. To the train dispatcher at Spokane.

Q. If the train passed your station at 4:19, what would you do?

A. If the train simply passed at 4:19 we would report to the dispatcher by telegraph, that the train, giving the number, had passed at 4:19.

Q. Suppose the train reached your station at 4:18 and left at 4:19, what would your wire be?

A. To the train dispatcher at Spokane, that train, giving the number, had arrived at 4:18 and departed at 4:19.

Q. Do you recall the passage of the train going west from Hope, Idaho, along about Sandpoint on the afternoon of November 13th, 1898, going towards Spokane?

A. I recollect that the train passed; yes, sir.

Q. Do you recollect the time it passed?

A. I could not say exactly; no, sir.

505 Q. I will ask you to state to the jury what you did on the passage of that train, whether you did or did not report it to the office at Spokane?

A. I did.

Q. State to the jury what the fact is as to whether or not that report was made accurately and truthfully?

A. It was.

Q. Have you any memorandum now as to whether the train did or did not stop at Sandpoint station?

A. It did.

Q. Have you any memorandum as to how long it stopped?

A. I have no exact memorandum of that particular train, as to the length of time; no, sir.

Q. Only simply that it did stop?

A. Yes, sir.

Cross-examination.

(By Mr. R. H. VOORHEES:)

Q. You say the train passed about sundown?
A. I did not say that; no, sir.
Q. What was the statement you made in regard to sundown?
A. I made no statement in regard to sundown at all.
Q. What was the nature of the day, do you remember that?
A. No, sir.

(Excused.)

506 G. W. HOWELL, recalled, testified as follows:

Direct examination.

(By Mr. THOMPSON:)

Q. I believe you testified—I am not sure—with reference to recollecting the passage of the train on the 13th day of November that we have been referring to, the passenger coming west from Hope?
A. Yes, sir.
Q. Do you have any recollection of the time that it passed, the actual time?
A. Not exactly, no; it was in the neighborhood of 4:30 or 4:40.
Q. What is the fact as to whether it was light or dark when the train passed Sandpoint?
A. It was light.

Cross-examination.

(By Mr. R. H. VOORHEES:)

Q. You mean by that that night had not set in?
A. Night had not set in; no, sir.

(Excused.)

F. D. WHEELER, testified as follows:

Direct examination.

(By Mr. THOMPSON:)

Q. Your name is F. D. Wheeler?
A. Yes, sir.
Q. What is your occupation?
A. Telegraph operator.
Q. Where have you served in that capacity in the last ten years?
507 A. Chicago and Great Western and Northern Pacific and Postal Telegraph.
Q. On what portion of the Northern Pacific have you served as an operator?
A. From August 28th, 1884, to August 31, 1900.
Q. And where?

A. At various points on the Idaho division and in Spokane general office.

Q. Where were you operator on the 13th day of November, 1898?

A. Hope, Idaho.

Q. What is the fact as to whether you were in exclusive charge or shared with your charge with somebody else there as operator?

A. With some one else.

Q. What hours did you serve as operator?

A. 7 a. m. to 7 p. m.

Q. I will ask you if you recall the fact of the passage westward of the passenger train through Hope, Idaho, in the afternoon of the 13th day of November, 1898, if you recall its passage?

A. Yes, sir.

Q. Do you recollect whether that train was on time or late?

A. Late, I think.

Q. How much late?

A. I can't say for certain, I think two or three hours late.

Q. Did you know Mr. Jay H. Adams?

A. Not personally acquainted with the gentleman.

Q. Did you see any one at Hope there that day that you afterwards was led to believe was Mr. Adams?

A. I did.

508 Q. State whether he was alone or whether any one was with him?

A. I could not say for sure; I think he was alone when I saw him.

Q. What sort of a looking man was he?

A. He was a rather short, stout, heavy-set man, with a florid complexion.

Q. How was he dressed, if you recollect; what kind of a hat did he have on?

A. I could not say that.

Q. What was he doing there when you saw him?

A. Writing a telegram.

Q. Do you know to whom that telegram was sent?

A. Mrs. Jay H. Adams, I think.

Q. Mrs. Jay H. Adams?

A. Yes, sir.

Q. Who sent that telegram?

A. I suppose it was Jay H. Adams; it was signed that.

Q. I mean what operator sent it?

A. I did.

Q. Did you see the gentleman after that?

A. He stood there for a couple of minutes after that and went out; I did not notice him after that.

Q. You do not recall that circumstance?

A. No.

Q. What were your duties as operator in addition to sending these occasional messages that would be handed in to you by citizens; what was your duty with reference to the railway service?

A. Handling messages and telegraphic orders, all tele-
509 graphing and everything that related to the telegraph work.

Q. What duties did you have to perform, if anything, with reference to advising the train dispatcher at Spokane of the arrival and departure of passenger trains at your station?

A. We reported the arrival and departure of all passenger trains.

Q. What was the rule of the company and what was your actual practice as to whether that was done accurately to the second and minute or whether it was not?

A. Accurate to the minute.

Q. When trains were belated and not running on the schedule time, how were they run, as to whether they were run by telegraph or not?

A. Telegraphic train orders.

Q. When the train reached Hope on that afternoon, remained for a short time and then departed, what is the fact as to whether you did or did not advise the city train dispatcher of the hour, minute, and second of its departure?

A. I did.

Q. I will ask you if you recollect what that hour, minute, and second was as you wired it to the train dispatcher in Spokane?

A. No, sir.

Q. You have no recollection on that?

A. No, sir.

Q. I will ask you to state to the jury what the fact is, as to whether you did or did not do that accurately?

A. To the best of my knowledge, I did it accurately.

510 Q. Who was the train dispatcher at Spokane at that time?

A. I cannot say who the train dispatcher was, the trickman, I cannot say.

Q. You simply sent in your wire in the ordinary way?

A. Yes, sir.

Q. You don't know how it was received, or by whom, in the office?

A. No, I could not say as to that.

(Excused without cross-examination.)

J. F. IRONS testified as follows:

Direct examination.

(By Mr. THOMPSON:)

Q. Mr. Irons, where do you reside?

A. About ten miles, between nine and ten miles, northwest of Milan on the Great Northern.

Q. What is your present business?

A. Timber business and ranching.

Q. Ranching and timber business?

A. Yes, sir.

Q. In the timbering business for yourself or for a railway company?

A. No; for myself principally and others.

Q. What was your occupation in the year 1898?

A. Telegraph operator for the Northern Pacific Railroad Company.

Q. Where located?

A. Athol, Idaho.

Q. How long have you been telegraph operator?

A. For this company?

511 Q. An operator generally?

A. At different times along for about twenty-five or thirty years.

Q. How long have you been operator for the Northern Pacific Railroad Company?

A. About six years I think.

Q. How long had you been located at Athol before the 13th day of November, 1898?

A. About four years.

Q. What were your duties as such operator at Athol station?

A. Take general charge of the company's business there at the office; reporting trains principally and dispatching.

Q. You did general dispatching as well. What is the fact—I don't know myself—as to whether you were Western Union agent also?

A. Yes, sir.

Q. You were Western Union agent, and took commercial business for them?

A. Yes, sir.

Q. What were your duties as confined to the dispatching work for the Northern Pacific railroad?

A. Receiving dispatches sent by the dispatcher and delivering them to trains.

Q. When a train would pass your station, a passenger train, what were your duties with reference to informing the train dispatcher at Spokane?

A. Reported the time the trains passed or arrived and departed.

Q. You may state to the jury whether or not your instruc-

512 tions and your actual practice were to do that accurately or otherwise?

A. Accurately, to the minute.

Q. State what the fact is as to whether you did so perform that duty?

A. I did.

Q. Do you recall the passage of the passenger train west from Hope, Idaho, on the 13th day of November, 1898, along in the evening about sundown or after?

A. Not exactly; not to the hour I don't remember quite; I know it was a little late.

Q. Do you actually recall the passage of the train?

A. I recall the passage of the train; yes, sir.

Q. I will ask you to state to the jury what you did as to reporting the passage of that train to the office of the dispatcher at Spokane?
A. I reported it immediately after it passed.
Q. I will ask you if you reported it by telegraph?
A. By telegraph; yes, sir.
Q. I will ask you to state to the jury what the fact is with reference to the accuracy of that report, whether it was accurate or otherwise?
A. It was accurate.

(Excused without cross-examination.)

A. G. KAMM, testified as follows:

Direct examination.

(By Mr. THOMPSON:)

Q. Mr. Kamm, where do you reside?
A. At Spokane.
513 Q. How long have you resided here?
A. Since 1894.
Q. What has been your occupation during the years since you have been a grown young man?
A. Operator and dispatcher.
Q. How many years has that been, Mr. Kamm, since you have been in that kind of service?
A. About twenty years.
Q. What positions have you occupied as such operator and dispatcher?
A. I have been operator for about ten and dispatcher for the remainder of the time.
Q. For what road have you been dispatcher?
A. Northern Pacific.
Q. Where has your office been during all the time that you have been train dispatcher?
A. Sprague and Spokane.
Q. Where were you performing that duty during the month of November, 1898?
A. Spokane.
Q. When a train passing over the Northern Pacific railroad was belated some hours, how was that train run, whether by wire or otherwise?
A. By special order.
Q. When such train passed any given station, what was the duty and the practice of the operator with reference to reporting such train by wire?
A. To report them when they had passed there.
Q. To what office?
A. To the dispatcher's office.
514 Q. To what place?
A. At Spokane.
Q. Do you recall the fact of a train being belated coming west

from Hope, Idaho, and reaching Spokane some time about 6 o'clock in the evening of November 13th, 1898?

A. Yes, sir.

Q. I will ask you, when the wires are received at Spokane indicating the flight of a belated train from station to station, what is done with those wires immediately upon being received, as to recording them?

A. They are recorded on a sheet provided for that purpose.

Q. What is that sheet called in railroad parlance?

A. The train sheet.

Q. With — degree of accuracy is that train sheet made?

A. It is accurate.

Q. State what the fact is in the moving of all passenger trains that are belated, that train sheet is depended upon and acted upon by the dispatcher in giving his dispatches?

A. Yes, sir.

Q. In other words, Mr. Kamm, if a train was coming west from Hope, Idaho, a belated train, running somewhere from forty to sixty miles an hour, and other trains were on the road between Spokane and Hope, Idaho, freight trains or passenger trains moving on the line, what is the fact as to whether the dispatcher in moving these other trains from station to station and locating them at different passage points would have to depend upon the accuracy of the train sheet or otherwise?

A. He depends entirely upon the train sheet.

515 Q. So that the safety of all the trains depends upon the accuracy of that train sheet?

A. Yes, sir.

Mr. C. S. VOORHEES: We object to the leading character of the examination of this witness.

The COURT: That is a leading question, but I will allow it because it is not harmful; it is simply aimed to bring out clearly what the witness has already said.

Q. Now, Mr. Kamm, have you a train sheet that was made in your office under your supervision on the 13th day of November, 1898, showing the flight of that particular train from Hope to Spokane?

A. Yes, sir.

Q. I wish you would refer to that train sheet. I wish you would point out on the train sheet what represents the passage of the particular train to which I have referred.

A. No. 1.

Q. The column marked No. 1 and at the top of that column marked "5:15 p. m."?

A. Yes, sir.

Q. Does that represent that particular train?

A. Yes, sir.

Q. And I will ask you to state what, at the head of that column, the figure 1 represents?

A. I don't remember.

Q. What does the word "Long" represent there?
A. The conductor's name.
Q. What does the next word below "Matheson" represent?
A. The engineer's name.
Q. What does the figure "220" represent?
A. Engine number.

516 Q. What does the "4:15" under the word "p. m." represent?
A. Time left Hope.
Q. What do the next following figures "4:39" represent?
A. Sandpoint arrival time.
Q. What do the figures "4:40" represent?
A. Departing time, Sandpoint.
Q. What do the figures "4:57" next below, represent, opposite the word Cocolalla?
A. Time passing Cocolalla.
Q. What do the figures "5:20" next below and opposite the word "Athol" represent?
A. The time passing Athol.
Q. And what do the figures "5:25" opposite the word Rathdrum represent?
A. Arrival at Rathdrum.
Q. What do the figures "5.38" immediately below represent?
A. Departure from Rathdrum.
Q. What do the figures "6.10" opposite "Spokane" represent?
A. Arrival time Spokane.
Q. What do the letters "p. m." immediately below that represent?
A. The afternoon.
Q. I will ask you to state what stops that train made between Hope and Spokane.
A. Sandpoint and Rathdrum.
Q. How long did it stop at Sandpoint?
A. One minute.
Q. How long at Rathdrum?
A. Three.
Q. What other stop, if any, did it make until it reached the limits of Spokane?
A. None that I know of.

517 (By Mr. C. S. VOORHEES:)

Q. Your last question was answered from your own knowledge or from knowledge that you get from that sheet?
A. From the sheet.

Mr. C. S. VOORHEES: In order to save the point, I move to strike out all of the answers that he has given as based upon what he obtained from that sheet, on the ground it is mere hearsay.
(Motion denied. Exception allowed.)

(Direct resumed:)

Q. The other figures and data that are represented upon this sheet, do any of them have anything to do with that particular train?

A. There is one.

Q. In what column is that. Let us see first whether it is of any importance or not. What does that (referring to sheet) represent, what are those figures?

A. 5:05 and 6:05 at Athol, showing that he met that train at Athol.

Q. Showing that some other train met that?

A. That was an east-bound train, yes, sir, met No. 1.

Q. And these figures show the east-bound train. What are those?

A. These are east bound and those are west bound.

Q. They would not represent this train except incidentally what some other train ran, indicated that this train met No. 1?

A. Yes, sir.

Mr. C. S. VOORHEES: That would not be competent, and I move to strike out that testimony.

518 Q. Now there is one figure that I did not call your attention to almost at the head of this column and immediately opposite the "4:15 p. m." is a figure "8," under the word "cars," what does that figure represent?

A. The number of cars in that train.

Q. I notice in the bottom of that column opposite the "6:10 p. m." at Spokane, the figure "8." What does that figure represent?

A. The number of cars in the train.

Mr. THOMPSON: We now offer that portion of the train sheet in connection with the witness' testimony.

Mr. C. S. VOORHEES: I object on the ground it is irrelevant, incompetent and immaterial, first; second, that it is merely hearsay; third, that it is secondary evidence, and the proper foundation has not been laid for the introduction of secondary evidence.

Mr. THOMPSON: Perhaps I had better connect one matter.

Q. I will ask you to state, Mr. Kamm, what other passenger train left Hope in the afternoon of November 13, 1898, and reached Spokane along about 6:10 p. m., whether there was any other train on the Northern Pacific, or whether that was the only one?

A. That is the only one.

Q. That column then, I will ask you to state what the fact is as to whether it does, or does not represent the passage of the only passenger train leaving Hope in the afternoon of the 13th of November, 1898, and reaching Spokane?

A. It does.

519 Q. Will it make any difference to this train sheet if we draw a line there, not obliterating anything?

A. No, sir.

Mr. THOMPSON: We now offer, if your honor pleases, the whole

train sheet, but only for evidence that portion of it contained within the sinuous ink lines drawn around the words "train record," and covering that portion referred to by the witness in his testimony.

Mr. C. S. VOORHEES: I object, first, upon the ground it is incompetent, irrelevant and immaterial; second, it is hearsay; third, that if it is evidence at all it is of a secondary character, and the proper foundation has not been laid for the introduction of secondary evidence.

(Objection overruled. Train sheet is received and marked Defendant's Exhibit "2." Exception allowed defendants.)

Cross-examination.

(By Mr. R. H. VOORHEES:)

Q. None of those facts that you have testified to as to the time of the arrival and departure of the train indicated on that sheet are within your own actual knowledge, are they, Mr. Kamm?

A. So far as the telegraph is concerned, I had supervision of that.

Q. All you know is what has been told to you by telegraph?

A. Yes, sir.

Q. That is all?

A. Yes, sir.

Q. You read what you have stated from the message that was given to you?

520 A. The train sheet; yes, sir.

Q. Did you actually receive the message?

A. No, sir.

Q. You simply then know what you state here only from the train sheet after it is made up?

A. From the train sheet; yes, sir.

Q. No other source of information at all?

A. No, sir.

Q. You did not make the train sheet yourself?

A. No, sir.

Q. Did not see it after it was made?

A. During the day, yes, sir, from time to time.

Q. But you made no part of it?

A. No, sir.

Q. It was made by other people?

A. Yes, sir.

Q. And you don't know of your own knowledge of the receipt by them of such telegrams, do you?

A. No, sir.

Q. You simply supposed they received the telegrams because that is on that train sheet?

A. Yes, sir.

Q. That they put down on the train sheet all they did—or at least by stating on the train sheets the time, there is an implication in your mind that they received the telegrams?

A. Yes, sir.

Q. That is all the information you received?

A. Yes, sir.

Redirect examination.

(By Mr. THOMPSON:)

Q. These people who do this work are employees under you, are they not?

A. Yes, sir.

521 Q. You have the supervision of it?

A. Yes, sir.

Q. And are responsible for the correct running of the trains and making of the train sheets?

—. ——.

Recross-examination:

Q. What connection has this part of the train sheet with train No. 1?

A. Those represent the east-bound trains; here is an east-bound train that was interested in No. 1 from the fact that it met No. 1 at Athol, arriving at 5:05 and leaving at 6:05, this train having passed there at 5:20.

Q. Then this train was waiting there, the train that got there at 5:05 and left at 6:05 was waiting at Athol?

A. Yes, sir; for No. 1.

Q. When No. 1 went by?

A. Yes, sir.

Re-redirect examination:

Q. It had to wait there an hour?

A. They could not go any further than there and had to wait for No. 1.

Q. In other words, they could not make the next telegraph station?

A. The next siding, as we call it.

Q. With safety?

A. Yes, sir.

(By Mr. VOORHEES:)

Q. No. 1 did not have to stop at Athol?

A. No, sir.

(Excused.)

Mr. THOMPSON: Mr. Bunn wants me to ask Mr. Howell one question.

Deposition of HENRY R. WILLIAMS was read as follows:

522 Direct examination.

(By Mr. KEELER:)

Q. Mr. Williams, please state your name, age, residence and business.

A. Henry R. Williams; age, fifty; residence, Chicago; general manager of the Chicago, Milwaukee & St. Paul Railway Company.

Q. How many years' experience have you had in practical railroad operation?

A. In all capacities, thirty-three years.

Q. State briefly in what positions during that time?

A. I was train dispatcher for ten years; train master for one year; superintendent for eight years; assistant general superintendent for eight years; general superintendent two years, and appointed general manager the first of February this year.

Q. Upon what railway system or systems has this service been performed?

A. Altogether on the road—Chicago, Milwaukee & St. Paul road.

Q. About how many miles of railway does the Chicago, Milwaukee & St. Paul railway operate?

A. Over 6,000.

Q. In what States does its road extend?

A. Illinois, Wisconsin, Michigan, Iowa, Minnesota, North and South Dakota.

Q. Does the Milwaukee road operate through and local passenger trains over its system?

A. It does.

523 Q. The sleeping-cars run over that system, are they owned and operated by the Milwaukee system?

A. Yes, sir.

Q. Are you famil-ar with the use of vestibuled passenger cars and sleepers running over this system, and other railroads in the West?

A. Yes, sir.

Q. State, if you know, whether the use of vestibules upon passenger cars and sleepers is recent or not.

A. It is comparatively.

Q. On and prior to November 13, 1898, state whether the Milwaukee used and operated unvestibuled passenger cars and sleepers in its trains?

Mr. C. S. VOORHEES: We object to that question, if your honor please, for the reason that custom cannot justify a negligent act, and that it would be no defense to the Northern Pacific that some other railroad had been operating unvestibuled cars. (Citing 91 U. S., 469; Galveston R. R. Co. *v.* Evanish, 61 Tex.)

The COURT: This evidence certainly seems to me to be legitimate evidence in contradiction to the testimony introduced by the plaintiff. You are going to argue to this jury that negligence existed because a careful and prudent railroad management would have ves-

tibuled or guarded the platforms of the trains so that passengers passing over could be protected from falling out or being hurled out or thrown out. Now, the jury have got to judge whether in this instance there was careful and prudent railroad management, and the only way that men of experience can judge of those things
524 is to compare what was done in this instance with what is usual and general on the part of careful and prudent people in the same line of business.

Mr. C. S. VOORHEES: Under the same circumstances and conditions.

The COURT: They have got to take into account all of the circumstances and conditions in the testimony and judge by comparison of that.

(Objection overruled.)

Mr. C. S. VOORHEES: I object upon the additional ground that the circumstances and conditions under which these other roads used unvestibuled cars in their trains do not appear in evidence, so the jury cannot make a comparison between the conditions as they existed at the time of the accident and the conditions under which other roads used the unvestibuled car.

(Objection overruled. Plaintiff allowed an exception.)

A. It did.

Q. To what extent?

A. To a very large extent.

Q. On or prior to that date, state whether or not the use of unvestibuled passenger cars and sleepers was common upon the Milwaukee system.

A. It was.

Q. If you know, state what the practice was in that respect among other railroads.

A. I can only state from observation that vestibuled and nonvestibuled cars were run on nearly all of our connecting lines. Of course I have no means of knowing of the operations of each. I think there were more, a great many more nonvestibuled than vestibuled.

525 Q. On and prior to November 13, 1898, state whether or not the Milwaukee system ran unvestibuled cars in its passenger trains in connection with other cars in the same train which were vestibuled.

A. They did.

Q. To what extent?

A. To an unlimited extent. I could not specify more closely. There would be no regularity in it. Nearly all the local trains on a great many of the lines had no vestibules whatever but one in fact of our through trains between Chicago and Minneapolis, called "The Pioneer Limited," was a fully vestibuled train, and there may have been others that were fully vestibuled part of the time, but we only had a small number of cars with vestibules, and they were run wherever the business required that, whether vestibuled or not.

Q. When was your Pioneer Limited train put on?

A. It was in the spring of 1898.

Q. After it was put on, prior to November 13, 1898, state whether or not unvestibuled cars were used occasionally in that train when occasion required.

A. They were.

Q. On other through passenger trains on the Milwaukee road, state whether or not unvestibuled cars were used in connection with vestibuled cars in the same train.

A. They were.

Mr. KEELER:

Q. To what extent was that the case outside of the Pioneer Limited train?

526 A. Why, it would be rather hard to answer that; it was general, although there were certain trains, such as the through train between here and Omaha and a few of them between here and Milwaukee, and some between here and Minneapolis, that we aimed as far as we could to keep vestibuled cars together because it made a more even and better looking train; but we ran nonvestibuled cars on those trains as the condition of the business required them.

Q. State whether or not the Milwaukee road, from time to time, ran tourist sleeping-cars in its through trains.

A. They have.

Q. What was the fact with regard to such cars being vestibuled or not?

A. I have seen some of them that were not vestibuled, and I am not sure whether I ever saw any that were vestibuled. We never asked the question.

Q. From your experience as a railroad man, state whether or not it was regarded as a safe and proper practice to run unvestibuled passenger or tourist or sleeping-cars in trains together with other cars of that kind which were vestibuled?

A. We always considered it so.

Q. State whether or not it is regarded among competent railroad men to be good and safe railroading to use unvestibuled cars in the same train with vestibuled cars.

Mr. VOORHEES: I object, for the reason it is not competent expert testimony. The jury will determine for itself whether it is safe railroading from the facts.

(Objection overruled. Plaintiff allowed an exception.)

527 A. I never heard the matter discussed, but the fact that we are doing it is evidence that we consider it a safe practice.

Q. If you know, state whether or not that is done by well managed and well conducted railways in the West.

A. I think it is.

Q. State what proportion of the passenger equipment of the Milwaukee road was vestibuled, including sleeping-cars, tourist-cars and passenger cars, on and prior to November 13, 1898.

A. I have no figures with me, but I should say four-fifths of them.

Q. Was what?

A. Nonvestibuled.

Q. In cases where nonvestibuled cars were run in the same train with vestibuled cars, state what was the practice of your company as to the order in the train in which cars were placed.

A. The cars were placed in the position where the business required them, regardless of whether they were vestibuled or nonvestibuled.

Q. What was the practice on other western roads in that respect?

A. I don't know.

Q. State whether or not the Milwaukee road has commonly placed unvestibuled cars in its trains between others which were vestibuled.

A. I can only answer that by answering as I did before, that the cars were placed in the position in the train as the business required, regardless of whether they were vestibuled or nonvestibuled.

Q. State whether or not that was the common and general practice on the Milwaukee road in that respect, prior to November 13, 1898.

A. Yes, it was.

528 Q. Had such been the practice or not, since vestibuled cars were first used on the system?

A. It had.

Q. From your railway experience, state whether or not such practice was regarded as good and proper railroading.

A. I never heard to the contrary. In my opinion it was, yes.

Q. From your experience as a railroad man, state whether or not that was a safe practice in operating passenger trains.

A. I considered it so.

Cross-examination.

(By Mr. VOORHEES:)

Q. Mr. Williams, you say that the system of vestibuling is of recent origin?

A. Comparatively, I say.

Q. Is it true that it has been in very general use anyhow since the year '92—the year of the World's fair in Chicago?

A. Quite so, yes, sir.

Q. And the system of vestibuling was invented some ten or fifteen years ago, was it not?

A. I cannot recall the exact time.

Q. You recollect some litigation between the Pullman and the Wagner companies, do you not, over the right to the vestibule patent?

A. I do, but I have no knowledge as to the time.

Q. Quite a number of years ago?

A. Yes, sir.

Q. Now, you say, Mr. Williams, that all the local trains had no vestibules whatever. Do I understand from you that the local trains

are the accommodation trains, the trains that stop at every station and carry way passengers?

529 A. No, I meant our trains—other than the fast trains between here and Omaha and between here and Minneapolis, which are our two main lines.

Q. And it was your purpose to vestibule the through trains that you speak of from here to Omaha and from here to Minneapolis?

A. Well, naturally we would, any new inventions of that kind would be put on those trains first.

Q. I will ask you, Mr. Williams, if the vestibule appliance is not used upon the Chicago, Milwaukee & St. Paul road because it is a safety appliance, and because it renders the safety of the passengers greater; isn't that one of the reasons why it is used?

A. A car with a vestibule for passengers passing from one car to the other, is certainly to a certain extent safer than one without it, the same as a man is safer in this room than one out on the street.

Q. Is it not also true, Mr. Williams, that the attachment of the vestibule appliance resulted in steadying the train and depriving it in a large measure of a lateral motion which it would otherwise have; isn't that true?

A. I believe that is one of the points claimed for it, that it was warmer in winter and cooler in summer. It is claimed for it also, that it assists in preventing telescoping in case of derailment.

Q. And that would result in greater safety to the traveling public, would it not?

A. Yes, if it does what it is claimed for it.

Q. And the first thought of your company is for the safety of its passengers, is it not?

A. Yes, sir.

530 Q. As against the safety of its rolling stock and equipment?

A. Yes, sir.

Q. Now, on these these local trains, Mr. Williams, that you speak of, were you in the habit of running dining cars day and night?

A. Yes, sir, on some of them.

Q. Ran them day and night?

A. Well, we run no cars—we run no dining-cars at night. Of course we run them after dark, as our lines are all so short that we always cut out the dining-cars along about eight or nine o'clock in the evening.

Q. And take them on in the morning?

A. Take them up in the morning at five or six or seven o'clock, as the case may be.

Q. Now, this Pioneer Limited which you say was put in service in the spring of 1898 was fully and completely vestibuled?

A. Yes, sir.

Q. You advertise a dining-car, which is your car of convenience attached to that train constantly, do you not?

A. No, only between here and Milwaukee.

Q. You advertise a buffet car and library car?

A. Oh, yes.

Q. And writing-room, so to speak, on your train, all the time, did you not?

A. Yes, sir.

Q. And extend to the traveling public an invitation to visit that car whenever it suited their pleasure or convenience to do so?

A. Yes, sir, to sleeping-car passengers.

Q. Passengers who were upon that train?

A. It was not put on for the accommodation of the coach passengers.

531 Q. You had some coaches, did you not?

A. Yes, sir.

Q. And the coaches were vestibuled, too?

A. Yes, sir.

Q. The train was vestibuled throughout?

A. Yes, sir.

Q. And to persons who you considered entitled to enjoy the comforts and conveniences of this writing car, writing and smoking-car—they could use it any hour, day or night, whenever they saw fit?

A. Not at all hours of the day and night. The men had to have a chance to rest on the car. They could use it up to about eleven o'clock.

Q. At all reasonable hours?

A. Yes, sir.

Q. And the train was by reason of the vestibule attachment just like a long room and a person could pass from one end of the train to the other without any danger of being thrown off the platform?

A. Yes, sir.

Q. You advertised that train, did you not, the "Pioneer Limited" as a solid vestibule train?

A. I don't recollect, but I presume I did.

Q. It was a fact at all events that it was a solid vestibuled train, and it never occurred to you in the management of your business to set into that "Pioneer Limited" train an unvestibuled car, did it?

A. We never had occasion to set any into it but we hauled them upon that train attached to the rear.

Q. Attached to the rear?

A. Because that was the convenient place to put them.

532 Q. And was it not also true that attaching them to the rear the traveling public, passengers, would not have to pass over unguarded platforms or to pass to and from this car of convenience that you are speaking of, that is true, is it not?

A. Yes, sir.

Q. That is a reason for hauling them on the rear of the train, isn't it?

A. Certainly, we would not go to the trouble of cutting them in two, between the vestibule car, and putting in a nonvestibuled car when we could just as well put them behind.

Q. Is it not true that you put them on behind because it was safer for the traveling public for the passengers that would pass from car to car, that is true, is it not?

A. Yes, sir.

Q. Now, Mr. Williams, would you say from your experience, from your long experience as a railroad man, that it would be safe railroading to operate a through train for the distance we will say of 1,500 or 2,000 miles, and one train running over the road each day, having advertised that the train was solidly vestibuled, carrying a dining-car day and night for the convenience of the traveling public, there being outstanding an invitation to every passenger to visit that dining-car whenever it suited his convenience and comfort so to do, to carry an unvestibuled car upon that train, the first passenger coach of the train being a smoking-car followed by the ordinary day-coach, the platform between the two cars being fully and completely vestibuled, the ordinary day coach being followed by
533 a tourist-car, the platform of which was unguarded, unvestibuled—unguarded in the sense of betng unvestibuled, both platforms, the rear platform of the day-coach being vestibuled, the tourist-car being followed by a dining car, the front platform of which was vestibuled, the rear platform of the tourist being unguarded, unvestibuied, and run that train at from sixty to seventy miles an hour around a seven degree curve; would you in your experience, from your experience as a railroad man, regard that as safe railroading?

A. I should not consider it unsafe railroading to haul the car in a train like that without a vestibule, but it would certainly be safer with it.

Mr. VOORHEES:

Q. Would you regard that as safe for the traveling public, the conditions that I have supposed?

A. I don't know what the conditions are in that place, but I should not want a train to run seventy miles an hour around a seven degree curve.

Mr. KEELER: Defendant moves to strike out the last portion of the answer, reading: "I should not want," and from that to the end, as incompetent, irrelevant, and not responsive and not cross-examination.

Mr. VOORHEES:

Q. Would you not regard it as very much safer for the passengers who accepted the invitation to pass from car to car to and from the dining-car for these platforms to be vestibuled?

A. Certainly.

Q. It would be very much safer, would it not?

A. It would certainly be safer; it don't require an expert to see that.

534 Q. Would be safer under all circumstances and conditions to the traveling public, to the passenger who was accepting this invitation to go to and from the dining-car to have the platforms vestibuled, would it not?

A. It certainly would, the same as I said before, that you would be safer here in this office than you would be out on the street; you

would be safer running at fifteen miles an hour than fifty. Nevertheless, we do not call fifty an unsafe speed.

Q. Mr. Williams, you stated a while ago that to run an unvestibuled—an unvestibuled car in a train where there were vestibuled cars, was a safe practice, will you state under what circumstances that would be a safe practice, running at the rate of fifteen miles an hour. I suppose it would be safe practice to run at the rate of twenty-five miles an hour, would it?

A. That is a hard question to reply to. I don't think it is considered—in fact, I know it is not considered unsafe to run cars without any vestibules at all.

Q. They did run for a long time before the vestibule was invented?

A. Yes, sir.

Q. You say it would be safe to run a train going at twenty-five miles an hour with one car vestibuled and the car next car to it unvestibuled?

A. Going at any speed that it would be safe to run a train at?

Q. What you mean would be a safe practice, the rolling stock would not be disturbed in any way and you would not run off the track?

535 A. The only point—of course the vestibule people claim a good many things for their vestibule in the way of less oscillation, as you mention, and prevention of telescoping, and convenience in passing from car to car.

Q. You mean convenience or safety in passing from car to car?

A. Both.

Q. Now, you have said, Mr. Williams, that it is a safe practice, or that it is safe railroading, or that it is good railroading; now, do you say that from the standpoint of a manager of a great big railway, or do you say that from the standpoint of a passenger who is traveling upon your road; now, from what standpoint do you view that question?

A. As I view it, from the point of the manager.

Q. If you view it from the point of the manager, you mean to say that the convenience of the vestibule appliance would in nowise prove detrimental to the company—to the company that you represent, it would not be unsafe in any way?

A. No, sir, it would not.

Q. There would be no chance of the train leaving the track or going into the ditch?

A. No chance of that.

Q. Do you think it would be just as safe for the passenger who was accepting the invitation of the railroad to pass from the unguarded platform, or the unvestibuled platform, if it was unvestibuled, as it would be if it was vestibuled?

A. No, sir, I do not.

Q. Now, then from the standpoint of a passenger, you would not regard the practice nearly as safe as you would from the manager's standpoint?

536 A. You have misconstrued me. What I meant to say was that a coach in a train is considered as safe when it is not

vestibuled at all. It is, of course, to a certain extent safer when it is vestibuled.

Q. Would you as a railroad manager, Mr. Williams, regarded the vestibule platform very much safer for the use of the passenger to whom you had extended the invitation to cross those platforms whenever he considered it his pleasure or convenience to do so?

A. I would.

Q. Is it not true that since 1892 solid vestibuled trains have been run out of Chicago to all quarters of the United States—solid vestibuled trains?

A. Well, I could not say as to all quarters, but there have been a great many of them.

Q. You are familiar with the splendid train that they run from San Francisco to New Orleans, are you not, the "Sunset Limited?"

A. No, sir, I am not.

Q. You know that there is such a train?

A. I have heard of it.

Q. That is a solid vestibuled train, is it not?

A. I don't know.

Q. Is it not true that the Empire State Express has been running, was running a long time prior to the 13th day of November, 1898, the Empire State Express, which is advertised as the fastest train in the world?

A. I never saw it.

Q. You never saw it?

A. No, sir.

Q. Don't you know that the train is advertised as a solid vestibuled train?

A. I don't recollect.

Q. You are not familiar with that train?

537 A. No, sir.

Q. Are you familiar with the train known as the "Continental Limited"?

A. I only know of a Continental Limited on the Wabash. I never saw it.

Q. You don't know whether it is a solid vestibuled train or not?

A. No, sir.

Q. The fact is, Mr. Williams, I suppose, that when the Chicago, Milwaukee & St. Paul advertised a train as a solid vestibuled train it will go to its destination as a solid vestibuled train, will it not?

A. Circumstances might arise which would make it necessary to put an unvestibuled car in there.

Q. Would you do that after advising the traveling public that there was no ambush on the train at all? Would you ambush them in that way?

A. We would have to put on such a car as we had. If it was non-vestibuled it would have to go.

Q. You would do that and let the traveling public take its chances on the unvestibuled platforms?

A. I don't think they would be taking any chances.

Q. Would it not be safer to have them vestibuled?

A. There is a possibility there.

Q. I understood you to say awhile ago, Mr. Williams, that you do not run your dining-cars all the way through?

A. No, sir.

Q. Would you not say that upon a train which carried a dining-car all the way through it would be very much safer for the patrons of the road, for the passengers, if all the platforms were vestibuled?

A. Yes, sir.

538 Q. Are you familiar with the equipment of the trains running on the Denver & Rio Grande road?

A. No, sir.

Q. Do you know anything about the trains that run on the 'Frisco line?

A. No, sir.

Q. You know about the solid vestibuled trains on the Nickel Plate?

A. No, sir.

Q. Are you familiar with the "Black Diamond Express" from New York to Buffalo on the Lehigh?

A. No, sir.

Q. You know anything about the equipment of the trains, on the Lackawanna?

A. No, sir.

Q. Have you any familiarity with the "Big Four," the solid vestibuled trains on the Big Four?

A. No, sir.

Q. Are you familiar with the equipment of the trains that run out of Chicago over the Pennsylvania?

A. I have seen their "Limited."

Q. You know that there is limited and that it leaves here about five-thirty every day, and has been so leaving for a number of years?

A. Yes, sir.

Q. From a time long prior to November 13th, 1898?

A. I don't know how long; it was some time.

Q. It was prior to that?

A. I think so.

Q. That is a solid vestibuled train, is it not?

A. Yes, sir.

Q. And has been run in that condition for a number of years; isn't that true also of the "Keystone Express," which goes out in the morning?

A. I don't know about that.

539 Q. Don't you know that the Baltimore and Ohio for a number of years has been running solid vestibuled trains to the East?

A. No, sir.

Q. You don't know that?

A. No, sir.

Q. You are familiar with the equipment of the trains on the Northwestern between here and St. Paul?

A. Yes, sir, on one train.

Q. There is one train that goes out solidly vestibuled, is there not?

A. Yes, sir, the one that runs opposite to our "Pioneer Limited."

Q. That has been running since a time prior to the 13th of November, 1898?

A. Yes, sir.

Q. This is also true in connection with the Burlington road is it not?

A. I am sure about that. I am not sure whether their coaches are vestibuled or not.

Q. Between Chicago and Omaha, your road runs from here to Omaha, as I understand it?

A. Yes, sir.

Q. What other trains, Mr. Williams, besides the trains you have described between here and Omaha, as running over your road, run from here to Omaha, that are solidly vestibuled?

A. I cannot speak definitely as to that, because I never have paid any particular attention to that subject, I presume all roads have them between here and Omaha.

Q. Other roads that run from here to Omaha are in competition with your road, are they not?

A. Yes, sir.

540 Q. You would be likely to keep in some sort of touch with the situation?

A. Yes, sir.

Q. Is it not true that prior to November 13, 1898, there were other roads running solidly vestibuled trains from Chicago to Omaha besides the Chicago, Milwaukee & St. Paul railway?

A. I cannot say definitely, but I presume there were.

Q. Now, it is true, is it not, there are some trains go out from Chicago with their sleepers vestibuled and the balance of their cars unvestibuled?

A. Yes, sir.

Q. Is it not the rule that when that condition exists, these trains are not advertised as solid vestibuled trains, but merely as trains carrying vestibuled sleepers, isn't that true?

A. I cannot say definitely as to that, but we would not be likely to advertise as a solid vestibuled train, a train that we did not aim to keep that way.

Q. Isn't that the way the Milwaukee & St. Paul advertises its trains? Is it not a train that they have advertised since they were put in the service—the "Pioneer Limited," since that time they have advertised other trains as carrying vestibuled sleepers?

A. I have not looked into that point. I would not swear to that. That would be the natural conclusion.

Q. If you were to see an advertisement of a passenger train as running solidly vestibuled you would expect them to have it, would you not?

A. Yes.

541 Redirect examination.

(By Mr. KEELER:)

Q. Mr. Williams, you have been asked about the "Pioneer Limited" train on the Milwaukee road, running between Chicago and Minneapolis, does that train carry tourist sleeping cars?

A. No, sir.

Q. You said that sometimes unvestibuled cars are attached to that train and when so, for convenience, it was generally at the rear of the train, in such cases, did passengers in those unvestibuled cars have occasion to pass through them to dining-cars or smoking-cars ahead of the unvestibuled cars?

A. They certainly would.

Q. Then, as to these passengers riding in unvestibuled cars, would it make any difference where such cars were placed?

A. Not to the passengers in those cars, nonvestibuled cars.

Q. Where nonvestibuled cars have been attached to the "Pioneer Limited" train, state whether such nonvestibuled cars have been placed at the rear because of any question of safety, to the passengers generally upon the train?

A. They were placed on the rear for convenience in handling the train and generally so, as also not to break up the electric lighting.

Q. As far as your knowledge or observation goes, state whether or not the limited trains on other roads to which your attention has been called on cross-examination, as, for instance, the "Pennsylvania Limited" and "Sunset Limited" and "Keystone Express," and other limited trains of that kind, all carry tourist sleepers.

542

A. I never saw one on any of those trains.

Q. Where tourist sleepers have been run upon through trains state whether or not it has been the practice to place them in any particular part of the train.

A. We do not handle very many tourist sleepers. I don't know in what portion of the train they have been hauled.

Q. Where the Milwaukee road runs tourist sleepers in its through trains, does it place them at the rear of the train?

A. I don't know. The only place that we have run a tourist sleeper lately is between Minneapolis and Mason City, and I don't know in what portion of the train it was hauled.

Q. As a railroad man, state whether or not there is any object for safety or otherwise in placing a tourist-car, when run in any particular portion of the train for safety or passengers.

A. No, sir; we should place it in the portion of the train which was most convenient in handling at junction points where it came on or was set out.

Q. Suppose you ran them through to the end of the line, would there be any different arrangement as to the particular portion of the train that it would be placed in so far as regards the safety of the passengers on those cars or passengers generally?

A. No, sir.

Q. You have been asked the reason for the use of the ves-
543 tibule appliances for passenger trains; state what is the primary and principal object of the appliance.

A. I believe the primary object, as claimed by the manufacturer, is to prevent telescoping, in case of collision or derailments.

Q. As a railroad man, what is your judgment as to whether that is or is not the primary or principal object of using this device?

A. I think it is.

Q. You have said in your judgment the use of non-vestibuled cars, together with vestibuled cars in the same passenger train, is safe and proper railroading, and have also said that where cars were vestibuled it was safer to the passenger who was crossing the platform; now explain fully why you regard the use of unvestibuled and vestibuled cars together as a safe and proper practice.

A. We consider the use of all nonvestibuled cars as entirely safe and proper practice, hence I should consider the use of unvestibuled and vestibuled cars together in the same train as proper practice.

Q. In your judgment, does the mere fact that a nonvestibuled car is placed in a train with vestibuled cars at any position in the train, add to the danger to the passengers more than the use of vestibuled cars entirely?

A. In my opinion the use of nonvestibuled cars and vestibuled cars in the same train would be a little safer than the use of all nonvestibuled cars.

Q. In practical railroading is it not frequently necessary to place unvestibuled cars in through trains regardless of whether other cars in such trains are vestibuled or not?

544 A. It is, unless all of your equipment is vestibuled.

Q. Does the Milwaukee road run tourist sleepers from time to time in its through trains between Chicago and Omaha?

A. Yes, sir.

Q. Are these through sleepers, or many of them, destined to the Pacific coast over your road and connecting roads to the west?

A. Yes, sir.

Q. Where such sleepers are run upon those trains, are they placed in any particular portion of the train, because of being vestibuled or not vestibuled?

A. I don't know in what position they are hauled.

Q. What is the fact as to such tourist sleepers, whether they are generally vestibuled or not?

A. I cannot answer that; I don't know.

Mr. VOORHEES: It is stipulated between the counsel that all examinations, direct and indirect, are taken under the objection of counsel for the plaintiffs, as incompetent, irrelevant, and immaterial, and against the issues in the case.

Recross-examination.

(By Mr. VOORHEES:)

Q. Mr. Williams, is it not true that since the year 1892, the solid vestibuled train has been in general use on the roads running out of Chicago?

A. Yes, on some trains.

Q. I say the solidly vestibuled trains?

A. That has been in gener ise on some trains of each road, but not upon all trains.

545 Q. Mr. Williams, if the "Pioneer Limited" were the only train running over the Chicago, Milwaukee & St. Paul railway, from Chicago to St. Paul, and it became necessary to take a tourist sleeping-car, that "Pioneer Limited" would carry it, would it not?

A. Yes, sir.

Q. Did you not say, Mr. Williams, upon cross-examination that up to this time you had never had occasion to carry an unvestibuled car on the "Pioneer Limited?"

A. Oh, no, we carry them often.

Q. Carry them often?

A. Yes, sir.

Q. And always put them in the rear?

A. Yes, sir.

Q. Did you not also say in response to one of my questions upon cross-examination, that they were placed in the rear for safety, amongst other things?

A. I didn't say for safety, I said for convenience in handling.

Q. Now, you say that the principal and primary object of using the vestibule is for the protection of the rolling stock and the equipment of the road?

A. It follows that they protect the passengers.

Q. Now, the vestibule appliance consists amongst other things of a door which closes each side of the platform, does it not?

A. Yes, sir.

Q. I wish, Mr. Williams, you would please describe that vestibule. Nobody can do it better than you can, if you will describe it now in technical language.

A. There are two kinds, what we call the narrow vestibule or the close, which was first introduced, and another which is called the "flush" vestibule.

546 Q. Is it not true that the principle of the two vestibules is the same?

A. Why, yes, sir, one encloses the platform.

Q. The flush vestibule being a little less comprehensive?

A. No, the flush vestibule is more comprehensive.

Q. That is the broad vestibule?

A. Yes, sir, the broad one.

Q. The principle is the same?

A. Yes, it encloses the platform.

Q. Will you explain the way in which it prevents telescoping?

A. It strengthens the end of the car. There are buffers provided on the ends of each car which extend all around the vestibule which strengthens it.

Q. Made of what?

A. They are metal.

Q. Steel?

A. I don't know what they are.

Q. Springs?

A. Yes, sir, and the platform, I think, is strengthened and it generally stiffens up the end of the car and prevents oscillation.

Q. Is it not true that this steel buffer which you speak of—these buffers are appliances which prevent the telescoping of the car?

A. They perform their part certainly.

Q. Don't they perform the principal part?

A. Well, I am not an expert on car construction.

Q. Well, in what way do the doors which lead off of the platform aid in preventing the telescoping of the car?

A. None whatever, that I can see.

547 Q. Then those doors are not put there, that is to say, the platforms, are not enclosed with the idea of preventing the telescoping of the cars by means of the vestibule appliance?

A. No, sir.

Q. Then those doors are put there enclosing the platform with the idea of protecting the passengers on the train, isn't that true?

A. Yes, sir.

Q. So the vestibule serves just as much the purpose of protecting the traveling public from the possibility of falling from the moving train as it does in protecting them from the dangers which attend upon a telescoping in case of a collision or accident, isn't that true?

A. That is one of its objects of course.

Q. You stated a moment ago, Mr. Williams, that, in your judgment, a train made up partly of vestibuled cars and partly of unvestibuled cars would be really safer than if the train were entirely unvestibuled, if I understand you correctly?

A. I said a little safer.

Q. And did you have in mind then a train that was all together vestibuled with the exception of a single unvestibuled car, which had been advertised as a solidly vestibuled train?

A. I did not have any particular make-up of a train in mind.

Q. Would you say, Mr. Williams, that if a railroad company had advertised a train as solidly vestibuled, and had set into that train an unvestibuled car, and the passenger had taken the train with the knowledge that he had acquired from the advertisement, that

548 under those circumstances the presence of an unvestibuled car in that train would make it a little safer?

A. No.

Q. You were asked if the presence of an unvestibuled car in a train, which was carrying also vestibuled cars, would add to the danger of the passengers, and you answered that it would not.

A. That was put a little differently, I think It was not as to one particular unvestibuled car, but as to a train that was made up

of vestibuled and nonvestibuled cars, it seems to me that if a vestibule is a safeguard that the having of the vestibuled cars in with the nonvestibuled ought to make it a little safer.

Q. Is it not true, Mr. Williams, that within your wide and broad experience that a passenger might cross the platform out of a vestibuled platform and cross to an unvestibuled platform without knowing that the platform was not vestibuled?

A. I don't know, sir.

Q. Do you not think it would add to the danger of the traveling public to have part of the trains vestibuled and part not vestibuled when trains were advertised as vestibuled?

A. If they informed the passenger when he got on the train that every platform was not vestibuled and that he could do as he pleased without any danger of falling off, why, then, perhaps there would be more danger to have an unvestibuled car in there.

Q. Now, do I understand you to say that you carry these tourist sleepers between Chicago and Omaha on your Limited?

549 A. We carry cars on our Limited that are not vestibuled. I don't recollect of carrying any tourist sleepers on there for some time, because the regular run of our tourist sleepers were upon our other train. They are not on what we call our Limited, although it is a vestibuled train.

Deposition of CHAS. A. GOODNOW was read as follows:

Direct examination.

(By Mr. KEELER:)

Q. Mr. Goodnow, please state your name, age, residence, and business.

A. Charles A. Goodnow; forty-six years of age; residence, Evanston, Illinois; place of business, Chicago; assistant general superintendent of the Chicago, Milwaukee & St. Paul Railway Company, having charge of the operation of the southern district comprising about 2,000 miles of railway.

Q. How many years of experience have you had in practical railroad operation?

A. Thirty years in various capacities.

Q. State briefly, what positions you have held in the railway service during that time.

A. As train dispatcher; train master; and superintendent; superintendent of construction, and assistant general superintendent.

Q. Upon what different railroads have you been engaged during that time?

550 A. On the Fitchburg Railroad of Massachusetts; New Haven & Northampton; New York, West Shore & Buffalo; Wisconsin Central; Chicago, Burlington & Northern, and Chicago, Milwaukee & St. Paul railway.

Q. State what lines of the "Milwaukee" system are under your immediate charge and in what States they extend.

A. The Chicago division in Illinois and Wisconsin; the Racine

& Southwestern division in Wisconsin and Illinois; the Chicago & Council Bluffs division, extending from Chicago to Omaha, in Illinois and Iowa; the Kansas City division in Iowa and Missouri; the Sioux City division in Iowa and South Dakota.

Q. To what extent do your duties require you to travel in trains over the territory in your charge?

A. I am traveling about half the time, on the average.

Q. Are you, and have you been familiar with the character of the passenger trains, both through and local trains, which are operated over the "Milwaukee" system?

A. I am familiar and have been familiar with such trains during my entire connection with the company.

Q. Are you familiar with the use of vestibuled passenger-cars, tourist-cars, and sleeping-cars, which are run over this system and other railroads in the West?

A. I am.

Q. Does the Milwaukee road own and operate its own sleeping-cars?

A. It does.

Q. How about the so-called "tourist" sleeping-cars?

A. So far as I know, the Milwaukee Company has no own-
551 ership in any such class of cars. When they are run over our lines they are hired from the Pullman or other companies.

Q. On or before November 13th, 1898, state whether or not the Milwaukee road used and operated nonvestibuled passenger-cars and sleeping-cars in its trains.

A. It did.

Q. To what extent?

A. The number of vestibuled cars at that time was very small as compared to the total number of cars in the service, and there were very few vestibuled trains.

Q. On and before that date, state whether or not the Milwaukee road ran cars which were not vestibuled in the same train with other cars which were vestibuled, and if so, to what extent.

A. It did, and it was customary to place vestibuled with nonvestibuled cars in the trains indiscriminately.

Q. When nonvestibuled cars were run in the same train with vestibuled cars, state whether there was any particular order or arrangement of these different kinds of cars in the trains.

A. It is customary on our lines to place the coaches ahead of parlor and sleeping-cars, and if it was necessary, to put an unvestibuled car in such a train, the unvestibuled car would be put wherever it was most convenient as regards the coaches.

Q. From your experience as a railroad man, state whether or not, in your judgment, it is or not a safe and proper practice in railroading to use unvestibuled cars in the same train with vestibuled cars, when occasion requires.

A. I regard it as entirely safe to do so.

552 Q. When so used, state whether or not in your judgment, safe and proper railroading would require any particular ar-

rangement of such cars in the trains. I mean, with reference to whether nonvestibuled cars should be placed by themselves or in connection with other cars which were vestibuled.

A. I don't think any such arrangement is necessary, and that judgment is based upon the fact that I have been familiar with the operation of vestibuled trains and cars since they came into use, and have never known, from my own experience, of an accident resulting from placing vestibuled and nonvestibuled cars indiscriminately in the train.

Mr. C. S. VOORHEES: I move to strike out the latter portion of that answer as irresponsive, and wholly incompetent, irrelevant, and immaterial. What I move to strike out is, "and have never known from my own experience of an accident resulting from placing vestibuled and nonvestibuled cars indiscriminately in the train." If your honor will permit, I have an authority upon that question that I would like to pass up to your honor (doing so).

(Motion denied; exception allowed plaintiffs.)

Q. State, if you know, whether or not the use of unvestibuled cars in connection with vestibuled cars in the same train was common practice among well conducted railroads in the West on and prior to Nov. 13th, 1898.

A. It was.

553 Q. Upon such railroads, state whether or not there was any custom or practice to place the nonvestibuled cars in any particular part of the train?

A. So far as I have observed, it was not done, and I therefore conclude that there was no such instructions out.

Mr. C. S. VOORHEES: I move, if your honor please, to strike "and I therefore conclude that there was no such instructions out."

Mr. THOMPSON: There is no objection to its been stricken out.

The COURT: Strike it out.

Q. Have you had frequent occasion in the past to travel over other railways in the West?

A. Yes, sir.

Q. In answering that it has been common to use unvestibuled together with vestibuled cars in the same train on other railways, do you speak from your own personal knowledge and observation or not?

A. I speak from my own personal knowledge and observation.

Q. As to tourist sleeping-cars, run by the Milwaukee road from time to time, state whether or not such cars were generally vestibuled.

A. They were unvestibuled.

Q. What was the custom of the Milwaukee road with reference to where such cars were placed in the trains? (Unvestibuled cars.)

Mr. C. S. VOORHEES: I move to strike out all of that answer,

554 before it is read, as not responsive to the question.

(Motion overruled. Plaintiffs allowed an exception.)

A. They were hauled on the rear end of the train because we have a special steam heating arrangement; these cars belonged to another company, and were not equipped with our arrangements, and should not be used in connection with our system; and further because our trains which haul that class of cars are electric lighted, and tourist cars are not wired for electric lights, and placing such cars elsewhere in our trains would have interrupted both the steam heat and the electric light.

Mr. C. S. VOORHEES: I object to that also on the grounds that I have heretofore urged in connection with the other testimony.

(Objection overruled. Exception allowed plaintiffs.)

Mr. THOMPSON: That objection may be understood as made all the time.

Q. State, if you know, whether the use of nonvestibuled cars in the same train as vestibuled cars was common on eastern roads on and prior to Nov. 13th, 1898.

A. I am not able to answer that, Mr. Keeler. I have not any definite recollection in regard to it.

Cross-examination.

(By Mr. VOORHEES:)

Q. Mr. Goodnow, the vestibuled appliance has been in operation constantly upon all of the roads in one way and another, since the year 1892, has it not? Since the World's Fair year.

555 A. Yes, sir, I think that is a fair statement of the term.

Q. Is it not also true that the solid vestibuled train has been run upon all the roads running out of Chicago, since 1892?

A. I think it is.

Q. Would you say from your own knowledge of the railroad situation in Chicago since 1892, that upon all of the roads running out of Chicago, one or more solid vestibuled trains have been run daily?

A. Not all of that time, I do not think.

Q. That is true, is it not, Mr. Goodnow, from a time anterior to the 13th day of November, 1898?

A. I think it is.

Q. Upon the lines of your system which you have described, as being under your general supervision, your road has been in the habit, and was in the habit prior to the 13th of November, 1898 of running trains that were given out to the public as solid vestibuled?

A. Yes, sir.

Q. And you aimed at all times to preserve the solid vestibuled character of the train that was so advertised to the public, did you not?

A. As far as was convenient with the handling of the business. There were times when we had to put in coaches and sleepers which were not vestibuled, into those vestibuled trains.

Q. That was not a general custom however, was it, Mr. Goodnow?

A. It was the custom when the necessity arose, but it was not the general practice.

556 Q. It was not the general practice?

A. No; what I mean by that is, we do not do it every day, because necessity does not require us to do it every day.

Q. Is it not true, when it became necessary to put in or send out a sleeper or a coach that was nonvestibuled, that you would send it out upon the train which you had not advertised as a solid vestibuled train, rather than upon the train which you had advertised as solidly vestibuled?

A. I could not say that it would. We have to meet the business requirements, and if we did not have vestibuled coaches and sleepers enough to take care of the business of that particular train, we would have to put in cars that were nonvestibuled.

Q. I understand you to say that the fact that you advertised to the general public that your train was solidly vestibuled, and the insertion into that train of an unvestibuled car, would be likely to mislead the traveling public, had no effect upon your general practice of putting an unvestibuled car into a train of that kind?

A. It is impossible to always furnish the exact equipment that you advertise that you will furnish. There may be a wreck, or there may be some other reason for changing that equipment, and while we generally expect to run vestibuled trains on certain schedules, we cannot always do it. There is no intention of misleading the public; we are simply forced into it by necessity.

Q. If you were forced into it by reason of a wreck, then that would be a very decided exception to your general practice—an exception to the rule.

557 A. Yes, sir; quite so.

Q. It is not true that the injection of an unvestibuled car into a train which had been advertised as "solidly vestibuled" would, in your practice, be an exception to your general rule?

A. Well, it would not be exactly an exception, because it would happen so frequently; it in a certain sense would be an exception, yet it happens very frequently and must, necessarily.

Q. Mr. Goodnow, upon the trains under your charge, which were advertised as solidly vestibuled and which you have testified, it was the purpose of your company to maintain in that condition?

A. So far as possible.

Q. Your company did not make a practice of injecting into that train an unvestibuled car every day that the train left Chicago for its destination, did it?

A. It did not so happen. It might have so happened.

Q. Now, Mr. Goodnow, this vestibule that has been talked about is an appliance invented for the purpose of rendering greater safety to passenger travel?

A. That is my understanding of it, yes, sir; safer and more comfortable.

Q. Safer and more comfortable?

A. Yes, sir.

Q. The first idea of a carrier of passengers, the first idea of your company is, the safety of its patrons, is it not?

A. Always; the safety is the first consideration.

Q. You would, then, Mr. Goodnow, in view of the fact that
558 this is a safety appliance, regard it as very excellent rail-
roading to have all of your cars equipped with vestibule appliances, would you not?

A. I am inclined to think that it would be a good thing to have on heavy, long trains. It would be a disadvantage to have it on local trains and trains running comparatively short distances.

Q. Is it not true that upon the trains which are advertised as solidly vestibuled and carried as solidly vestibuled, maintained in that way, that the ordinary notice to the traveling public not to ride on the platforms, not to get on the platforms, is wanting?

A. That notice has been generally discontinued everywhere. We have no such notice on our equipment.

Q. You have no such notice on your solidly vestibuled trains?

A. On any of our trains. It goes without saying, you know, that passengers should keep off of the platform, if they have due regard for their safety.

Q. That would not be true however, if the platform was enclosed so there would be no danger whatever in crossing the platform, would it?

A. It is the better part of care—the better part of valor to keep off of the platform under all conditions.

Q. Would that be true where you had extended an invitation to the passenger to go to and from the dining-car or buffet car whenever it suited his convenience?

A. That condition is always true.

Q. Would you say that a passenger would have no right to
559 accept your invitation and rely upon the assurance wrapped
up in that invitation, that an acceptance of it would entail no danger upon him.

A. That is a different proposition, it requires a different answer. We are considering the question of safety in case of a collision or a derailment—where a passenger would be the most in danger—whether it was vestibuled or whether it was nonvestibuled, and it is a good place to keep off of under all conditions.

Q. I am not talking about riding on the platform. I am talking about crossing the platform; that is the question.

A. When you cross it, you have to ride on it, and you cannot tell what instant an accident will occur.

Q. Isn't that true if a person is sitting in a seat in a car? They cannot tell what moment a car or train will go into a ditch and the passenger be smashed up? That would be equally true?

A. It is not equally true in the same extent; the danger inside of a coach is much less than on the platform.

Q. Even though the platform is vestibuled?

A. Yes, sir, even though the platform is vestibuled.

Q. Now, I ask you again, if one of your passengers would not have the right to deem his way perfectly safe when you had extended to him an invitation to use platforms for the purpose of crossing, going to or returning from a dining-car, or buffet-car, or other car of convenience, that you have upon that train?

A. I answer you again by saying that a passenger when he is on a railroad train must always have in his mind that
560 railroad travel is dangerous; never lose sight of that a moment; and that he must recognize that when he crosses a platform that there is danger in it.

Q. Mr. Goodnow, you don't answer my question. I asked you whether a passenger upon your road would not have a right to assume that that danger had been reduced to a minimum in view of the fact that you had invited him to pass to and from the dining-car, or from car to car?

A. You did not ask that.

Q. Isn't that true?

A. I think it is.

Q. Now, the vestibule appliance is a safety appliance, in the first place, because by its adoption, the entire platform is enclosed on the sides, isn't that so?

A. Well, there is more than one kind of vestibule.

Q. Well, isn't that true of all the vestibules?

A. No.

Q. That the sides are enclosed? I don't mean clear down to the end of the steps, but isn't it true that there are some vestibules that go right down—the doors of which extend clear to the end of the platform?

A. Yes, sir.

Q. That is true, is it not?

A. Yes, sir.

Q. There are other vestibules, the doors of which extend down to the bottom of the last step?

A. No, they extend to the flush edge—flush with the edge of the car.

Q. Flush with the edge of the car?

A. Yes, sir.

Q. When you say "flush" with the side of the car, you mean also flush vertically with the steps?

A. No, with the platform of the car, not with the steps, but with the platform.

561 Q. And the door is right over the last step, is it?

A. Yes, sir.

Q. So that in all systems of vestibuling the inclosure of the platforms is one of its essential features?

A. Yes, sir.

Q. There is no system of vestibuling that does not involve the complete inclosure of the platform?

A. Not so far as I know.

Q. The vestibule appliance prevents telescoping because of the heavy set of steel springs, or buffers between the two cars, does it not?

A. It will assist in preventing it.

Q. And would *rather* a train adopting it steadier in its motion, would it not?

A. There would be less oscillation.

Q. Less oscillation and less lateral motion?

A. Yes, sir.

Q. It would also be true, if a train was going around a sharp curve, there would be less lateral motion by reason of the presence of the vestibule appliance, would there not?

A. I do not think that would cut any figure.

Q. You do not think that would cut any figure?

A. No, sir; it is a question of track—the condition of the track, I would say.

Q. Now, upon the trains that have been operated under your supervision, Mr. Goodnow, you have been in the habit of running dining-cars?

A. Yes, sir.

Q. And have extended to all of your patrons an invitation to visit the dining-car?

A. Yes, sir.

562 Q. Whenever it suited their convenience to do so, that is true?

A. Yes, sir.

Q. Whenever that dining-car was on a train it was perfectly free of access to any passenger who desired to go there, whether meals were ready or not; isn't that true?

A. No.

Q. Didn't you sell cigars and liquors on your dining-cars?

A. Not excepting at meal times. We don't invite passengers to go to our dining-cars except when they are serving meals.

Q. You don't?

A. No, sir.

Q. Do you permit them to do so?

A. We would not object, we would not stop a passenger who should do so.

Q. If the dining-car was attached to one of your trains and a passenger desired to go there to get a drink or buy cigars, purchase wine or beer, you would permit it?

A. In some States we would; in others we would not.

Q. I am not talking now from a standpoint of prohibition.

A. No.

Q. Now, when you have been serving meals upon your dining-cars, you would invite the traveling public into your dining-cars while the train was in motion?

A. Yes, sir.

Q. You never thought of stopping your car in order to enable passengers to cross the platforms to go to their meals?

A. No, sir.

563 Q. If a passenger desired to enter the dining-car for some purpose of pleasure or convenience or comfort, at other times than the hours fixed for meals, you would never stop him?

A. We would not stop him if he said he was going to buy a cigar or purchase a drink; but if he was going there to sit, or while away the time, we would say to him that the dining-car was not for occupancy under those conditions.

Q. You would not know that he was going to sit there and while away the time until he did so?

A. Oh, yes; the men in the car would see him enter.

Q. Then they would——

A. Or the brakeman might see him making for the car.

Q. Now, it is true, is it not, Mr. Goodnow, upon your Pioneer Limited, you run, in addition to the dining-car, what might be called a buffet or a library-car?

A. We do; yes, sir.

Q. A car having easy chairs, writing conveniences, and a car in which cigars and liquors might be bought, that is true, is it not?

A. Yes, sir.

Q. And at any hour of the day and night when the persons in charge of that car were not resting——

A. Yes.

Q. —the passengers upon that train are permitted to pass across the platforms at their will going to and returning from this buffet or library-car?

A. Yes.

Q. That is true, isn't it?

A. Yes, sir.

564 Q. The same rule would not apply to the buffet-car you have just suggested as might apply to the dining-car?

A. It would not.

Q. This Pioneer Limited was a solid vestibuled prior to the 13th of November, 1898—was a solidly vestibuled train, was it not, running between Chicago and Minneapolis?

A. Yes, sir.

Q. And your purpose was to maintain it as such?

A. Yes, sir.

Q. And isn't it true that one of the purposes of the vestibuling of that train was that the passengers might more safely enjoy the comforts and conveniences of this buffet or library-car?

A. Well, one of the minor purposes was that our vestibuling, is that passengers might pass back and forth.

Q. You say that was one of the minor purposes?

A. Yes, sir.

Q. And yet, Mr. Goodnow, you have already said your chief purpose in operating them was to cater to the safety of the traveling public, to the safety of the passengers?

A. Yes, sir.

Q. Why do you say, then, this safety appliance which does result in greater safety to your passengers was a minor consideration?

A. Because the safety that I refer to is in case of collision or derailment, the vestibule creates a slightly stronger car, and it also prevents oscillation. It also helps keep the train warmer in winter, so that the passing back and forth of passengers is and was a minor consideration in the adoption of the vestibule cars There is

565 a very little of it; that is the percentage of passengers who wander back and forth in a train of that kind is very small.

Q. But still they all are permitted to do so and invited to do so?

A. They are all permitted to do so.

Q. And invited to do so?

A. They are not necessarily all invited to do so.

Q. Isn't it true Mr. Goodnow, that upon your Pioneer Limited there is no smoking-room in any of your sleeping-cars?

A. Yes, sir.

Q. That is true, isn't it?

A. That is true.

Q. And it is impossible for a man who smokes, and most of the world smokes——

A. Yes.

Q. —to enjoy his cigar except in this library or buffet-car, isn't that true?

A. That is very true.

Q. Then to every passenger who smokes there is a standing invitation to go to that buffet-car whenever he desires to smoke?

A. There is no invitation, there is a permission.

Q. You permit it?

A. We permit it but we don't invite them.

Q. I understand, but you advertise to the public that it is there for their use and they may go there whenever they please, whether the train is in motion or standing still?

A. They are permitted to use the buffet-car for smoking and lounging purposes.

Q. And you inform them——

A. We don't invite them.

Q. You inform them it is there for that purpose and they
566 can go to it whenever they please; that is true, is it not?

A. That is true.

Q. And the car is never stopped for the purpose of permitting a passenger to get to that library or buffet-car?

A. So far as I know, it never was. I don't believe it ever was.

Q. Now, you said a while ago, Mr. Goodnow, that these tourist-cars were placed in a train with vestibuled cars wherever it was convenient. Do I understand you to say that this was altogether without reference to the safety of the traveling public?

A. I didn't say that.

Q. Well I ask you if you do.

A. But what I did. I didn't say it, if you are asking that direct question.

Q. Now, isn't it true that in determining where it would be convenient to place the unvestibuled car, that your first thought would be for the safety of your patrons? And would consequently place the car—make it convenient to place the unvestibuled car where there would be greater safety for the passengers traveling on the train; isn't that true?

A. It is not true. We would have to place the car where it would best do the work that was required of it.

Q. If it would do the work a little bit less well by being place- in a certain part of the car, and by placing it upon a certain part of the

train, and by placing it in a certain part of the train, in that
567 particular part of the train, if that would result in greater safety to the passengers, you would place it there, wouldn't you, even though it didn't do the work quite as well?

A. That is a very difficult general question to ask. I cannot answer it fairly, because I must know what that coach is, what service it is going to perform and the character of the train; in other words I don't very highly regard this vestibuling of trains so far as the safety of the passenger is concerned, from one car to another; there isn't very much in that, because more trains are operated to-day that are not vestibuled than—many times over than are vestibuled.

Q. And yet the solid vestibuled train is now, and has been since a period prior to 1898, the 13th of November—to wit, since 1892—in general use upon the roads—all the roads running, out from Chicago?

A. A few trains have been in use a very few trains.

Q. But these solid vestibuled trains have been in general use upon the roads?

A. I don't care to modify that or change it, it is on a few trains.

Q. On a few trains on each road?

A. On each road.

Q. Now, you were asked awhile ago whether or not it was proper on a well-conducted railroad to use unvestibuled cars in connection with vestibuled cars. What is your idea, Mr. Goodnow, of a well-conducted railroad?

A. Well, such a road as the Chicago, Burlington & Quincy,
568 the Chicago, Rock Island and Pacific, the Chicago and Northwestern, or the Chicago, Milwaukee & St. Paul, if you please.

Q. Would you regard a road as well conducted which would run its passenger trains around a six or seven degree curve at a rate of speed from sixty to seventy miles an hour, with an invitation outstanding to all of the passengers to cross the platform whenever it suited their pleasure or convenience to do so, to visit the dining-car or the car of convenience and would set into its passenger trains a single car which was unvestibuled, every other car being fully vestibuled, having advertised to the public that they were running vestibuled trains?

A. That is a very wide question and hard to answer it directly. I would say that such an action does not imply necessarily a road that is not well conducted or well operated. A curve of six or seven degrees may be so elevated that it is perfectly safe to go around it at sixty or seventy miles an hour. That is merely a question of mechanics. Now, the placing of an unvestibuled car in an otherwise vestibuled train must be governed by the conditions the convenience of the passengers who are riding on that car; but if the convenience of those passengers and the convenience of operation required that car to be placed in the middle of a vestibuled train I would not think it showed a road that was not safely or properly operated.

Q. Assuming the conditions that I have already suggested to you,

and assume further that in the face of the advertisement that they were running—that the road was running a solidly vestibuled
569 train, they made a constant practice of running a car day after day in a train otherwise fully vestibuled, which car was not vestibuled, I ask you if that would be in your judgment a well-conducted road.

A. That question cannot be directly answered without knowing the makeup, the exact makeup, of the train. Now, you might put a tourist-car next to your baggage-car, that was nonvestibuled, and the tourist in that car would have no right in your buffet-car or your sleepers, or to use any other portion of the car. Now, under those circumstances it would not be a bad practice or show an ill-managed road to put a car in that position.

Q. Assuming the conditions that I have already assumed, and assume the train to be made up in this way, after the mail, baggage and express, or mail, express and baggage between them—the mail-car is next to the engine, is it not, in the makeup of trains?

A. It is with us; it might not be on some roads.

Q. Following that is the express car?

A. The express-car.

Q. And following that the baggage-car?

A. Yes, sir.

Q. Now, assume that a train was made up in this way, a smoking-car followed by an ordinary first-class day passenger coach, the platforms between those two cars being fully vestibuled, the rear platform of the day-coach being vestibuled, the day-coach being followed by a tourist sleeping-car, neither platform of which is vestibuled, the tourist sleeping-car being followed by the dining-car, the front
570 platform of which was vestibuled, the rear platform of the tourist-car being unvestibuled, and given all the other conditions, I ask you, if you in your judgment as a railroadman, think that would be good railroading?

A. I should have to say that that would be good railroading because we are doing it ourselves.

Q. And that is the reason that you say it would be good railroading, is because you are doing it yourselves?

A. Yes, sir; and other roads are doing it also.

Q. Well, it is true, isn't it, Mr. Goodnow, that you regard a train that is vestibuled as safer in all respects than a train that is unvestibuled, don't you?

Q. Our experience has not demonstrated any such fact. This vestibuling has come in as a sort of an advertisement and has been forced onto the railroads by the Pullman Company, and it has never yet, so far as I know or have been able to learn, been demonstrated that it has added anything to the safety of the train.

Q. You have been forced to adopt it because other roads are adopting it and advertising solid vestibuled trains; isn't that true?

A. It is not true particularly of us. It is true of all roads.

Q. Well, when I say you I speak of you as the representative of the railroads.

A. I understand it.

Q. And haven't you been forced to adopt it because of the general prevailing notion that the traveling public—that the presence of the vestibuled appliance makes the train safer?

A. I should say no.

571 Q. You would say no?

A. Yes, sir.

Q. Why, then, have you been forced to adopt it against your will?

A. Simply because it is a catch-penny device to advertise the road. It is like putting a $25,000 sleeping-car onto a train and carrying a passenger that gets off at a two-dollar station somewhere. It is a mere advertisement.

Q. You say it is a catch-penny device?

A. Yes, sir.

Q. You mean to catch the pennies of the traveling public, because they regard the train as a better train to travel on than a train that is unvestibuled?

A. No, it is something new; that is what I mean.

Q. Something new?

A. Something new.

Q. Yet it has been in operation ever since 1892.

A. Only to a very limited extent—a very limited extent, indeed.

Q And was in operation prior to 1892, wasn't it?

A. I don't think so. I don't think so. It may have been, but I don't think so.

Q. Don't you recall the litigation between the Pullman and the Wagner companies over this patent, which antedated 1892 several years?

A. About that time I recollect of the litigation.

Q. Well, it is true, isn't it, Mr. Goodnow, that if the platform is enclosed, fully enclosed, that a passenger can more safely pass back and forth over the platform than if it were unenclosed?

A. I think that is a fair presumption.

572 Q. That is absolutely true, isn't it?

A. The same as it would be if he stayed in the center of the car, he would be safer, or if he didn't go upon the train at all—it is about the same basis, I think.

Q. Now, you mean to be understood also as saying it would be safer from a passenger's standpoint, as well as from the railroad man's standpoint—from the standpoint of a superintendent?

A. That is pursuing a different line. You have been asking me from a passenger's standpoint exclusively.

Q. You have been discussing it from a passenger's standpoint. I just wanted to know if that was the case.

A. Yes, sir.

Q. Is it not true, Mr. Goodnow, that there has been running on the Pennsylvania road here a so-called limited train for ten years past, solidly vestibuled, between Chicago and the East?

A. I cannot say what length of time that has been running as a vestibuled train. I know they have been running a limited train, but my impression is that at first it was not a vestibuled train, when it was first put on.

Q. You don't remember, then, that that train was running as far back as 1895?

A. I have no recollection as to when it was put on.

Q. It has been running a number of years?

A. It has been running a number of years.

Q. But that train has been running since 1892?

A. I cannot answer when it was put on. I had no personal knowledge of that train prior to 1895; that is, I never saw it, I mean.

573 Q. Prior to 1895.

A. 1895.

Q. You are familiar with it since 1895?

A. Since 1895.

Q. And it has been running regularly since 1895?

A. Yes.

Q. Isn't that true also of the Keystone Express that goes out on the Pennsylvania road in the morning?

A. Well, that is not always a vestibuled train even now.

Q. It is not?

A. No, sir, that is the 10:30 train you refer to?

Q. Yes.

A. That is not always a vestibuled train. I will explain. There are some cars in it that are vestibuled, but others which are not.

Q. The Pennsylvania Limited train that we were just speaking of is advertised as a solidly vestibuled train, is it not?

A. I don't know.

Q. You don't know?

A. No.

Q. Well, you know it is a solidly vestibuled train, and you know that they never carry an unvestibuled car on it, do you not?

A. I know that they have changed their equipment on it and that the regular equipment has been pulled off within my knowledge. I had occasion to go East and caught a train that was not the regular equipment. I think, however, all cars were vestibuled.

Q. You never have, in your travel over that train, have known an unvestibuled car to be set into the train, have you?

A. I never traveled on it but twice.

574 Q. There was no unvestibuled car in it those two times?

A. It is my recollection there was no unvestibuled car in it at that time.

Q. The Burlington route, since, say prior to the 13th of November, 1898, was running a solid vestibuled train between here and Minneapolis, was it not?

A. Well, those are questions that I cannot answer.

Q. You would not be able to answer those questions except in a very general way?

A. In a general way.

Q. As you have already answered that since 1892, the World's Fair year, the solid vestibuled train has been in general use on all of the roads on some trains?

A. Yes, sir, that is correct.

Redirect examination.

(By Mr. KEELER:)

Q. Mr. Goodnow, in the operation of passenger trains over well managed railway systems, is there any fixed order in which the different cars of a particular train shall be placed?

A. In answering that in a general way, no.

Q. Now, explain more fully your meaning?

A. *It is customary* to always haul the mail, express and baggage cars on the head end of the train. It is usually customary to haul the smoking-car next to those cars; but on our own road we haul, on some trains, the smoking-car on the rear of the train, and on some other trains we haul the smoking-car next to the bag-
575 gage—and the baggage, mail and express-cars and sleepers on the rear. There is no fixed rule in regard to that matter.

Q. What governs in good railroading the order in which particular cars are placed in any particular train?

A. The conditions of service, the necessity of the service and the class of business that you are handling in those cars.

Q. How was it with regard to the arrangement of tourist and regular sleeping-cars, was there any fixed position in the train for such cars on well-regulated roads?

A. I don't think there ever was or is. As previously stated, it is dependent upon the kind of train that they are put into—steam heat and electric light, and so forth.

Q. I think you said on cross-examination that the aim among good roads was to provide, as far as possible, for the safety of the passengers, consistent with the practical operation of trains?

A. I said so; yes, sir.

Q. Now, does that question of safety at all require that any particular passenger-car shall be placed in any particular portion of the train?

A. It is my judgment that it does not.

Q. In placing cars in your passenger trains, do you have to take in consideration the convenience and safety of all the passengers in all the different cars of the train?

A. We do.

Deposition of A. B. NEWELL was read, as follows:

Direct examination.

(By Mr. KEELER:)

Q. Mr. Newell, will you please state your name, age, residence, and business?

576 A. A. B. Newell; thirty-two years of age; residence, Chicago; superintendent of the Western division of the Lake Shore & Michigan Southern railway.

Q. How many years' experience have you had in practical railway operation?

A. Nine.

Q. State briefly what positions in the railway service you have filled during that time.

A. I have been superintendent of three divisions of the Lake Shore railroad. Prior to that I had had office experience, and so forth.

Q. Your general office in Chicago is situated where?

A. In the Van Buren Street station, corner of Van Buren and Pacific avenue.

Q. Chicago?

A. Chicago; yes, sir. The general office of the road is in Cleveland, Ohio.

Q. What roads run their passenger trains into that depot where your offices are located?

A. The Chicago, Rock Island & Pacific, New York, Chicago & St. Louis, and Lake Shore & Michigan Southern.

Q. The Western division of the Lake Shore & Michigan Southern road, of which you have charge, is that a part of the main system and line of that road between Chicago and the East?

A. Chicago and Elkhart.

Q. That is on a part of the main system?

A. Yes, sir.

Q. Do all the passenger trains of that road in and out of Chicago pass over your division and under your control while on your division?

A. Yes, sir.

577 Q. Are you familiar, from railroad experience, with the use of the vestibule appliance on passenger-cars?

A. Yes, sir.

Q. Are vestibuled passenger and sleeping-cars in use upon your road?

A. Yes, sir.

Q. What is the practice of your road with reference to running nonvestibuled cars, together with vestibuled cars, in the same train?

A. We do it every day.

Q. Upon what character of trains?

A. It is done on all of our trains with the exception of what we call the Lake Shore Limited that runs solid between New York and Chicago.

Q. The Lake Shore Limited is a special train charging extra fare and limited as to the class of passengers, is it not?

A. Yes, sir; it is limited. There are no coach passengers on that train, they are all sleeping-cars, diners, and so forth.

Q. With the exception of that special limited train, do I understand you that you run nonvestibuled with vestibuled cars in other trains together?

A. Yes, sir.

Q. By that do you mean nonvestibuled passenger and sleeping-cars as well as others?

A. Yes, sir.

Q. How long has it been the custom of your road, in these trains, to run those different kinds of cars in the same train?

A. Ever since the vestibule was introduced on passenger-cars.

578 Q. What has been the practice of your road with reference to the order, if any, in which the different kinds of cars were placed in your trains by that I mean vestibuled or unvestibuled cars.

A. The trains are made up in certain rotation with the sleepers in one position, coaches in another, smoker in another, and baggage-cars, et cetera, and the trains are always made up in that way regardless of whether the cars are vestibuled or not.

Q. So that, in your regular practice in running trains over that road, are unvestibuled cars placed in between other cars which are vestibuled, sometimes?

A. Yes, sir.

Q. Does your road, on these trains, run tourist sleeping-cars?

A. Yes, sir.

Q. And dining-cars?

A. Yes, sir.

Q. And smoking or buffet-cars?

A. Yes, sir.

Q. And day passenger coaches?

A. Yes, sir.

Q. And sleeping-cars?

A. Yes, sir.

Q. All in the same trains?

A. Yes, sir.

Q. To what extent does your road run tourist sleepers over its system?

A. Two times a week in both directions.

Q. Upon what kind of trains?

A. First-class trains.

Q. Between what points?

A. They run between Chicago and Boston.

Q. Are those tourist sleeping-cars run upon your first-class through trains?

A. Yes, sir.

Q. Are such tourist sleepers generally vestibuled or not?

A. Not vestibuled.

579 Q. When run, where do you put them in your train?

A. On our east bound, they go out on our 10:30 train in the morning, our number ten, which is a first-class train from New York to Boston, made up of buffet-car, and sleepers and diner and coaches. The tourist sleeper is put behind the dining-car and ahead of the day-coaches, the day-coaches on that train being carried on the rear end in all cases.

Q. Then as I understand you, your tourist sleeper is placed somewhere near the center of the train or in the body of the train?

A. In the body of the train; yes, sir.

Q. Is that train known as the New York and Boston Special?

A. Yes, sir.

Q. How does that train rank in your service?

A. It is the best train we have, outside of the limited, in fact a great many people prefer it to the limited.

Q. To what extent is that train patronized by first-class passenger travel between New York, Boston and Chicago?

A. To a very large extent. We run three sleepers on that train every day; one to New York and two to Boston; and very frequently we have to put on extra sleepers to accommodate the business.

Q. Besides the tourist sleepers from time to time, as occasion requires, do you also run other cars, passenger and sleepers, which are not vestibuled, in that train?

A. Yes, sir; we frequently have on nonvestibuled coaches and nonvestibuled first-class sleepers when we are not able to furnish a higher class of sleeper, we take what we can get.

580 Q. Now, state whether or not such nonvestibuled cars are placed in different parts of your train, in the body as well as other parts.

A. As I said before, the cars are placed in regular rotation in the train regardless of whether they are vestibuled or nonvestibuled.

Q. By that method do your nonvestibuled cars frequently come between other cars which are vestibuled, and *vice versa*?

A. Yes, sir; they do in every case with those tourist sleepers on the 10:30 train, as the dining-cars are vestibuled, and the coaches, as a rule.

Q. From your own practical experience and observation, as a railroad man, will you state whether that practice is common and general among well-conducted railways east of Chicago?

A. I have seen a great many instances of nonvestibuled cars being placed between vestibuled cars in trains.

Q. Are you able to state whether or not that is a common and a general practice among well-managed railroads?

A. It is with us; and I have seen, as I say, a great many cases of its being done with other roads.

Q. What other roads can you refer to having that practice?

A. The Michigan Central is one, and the Pennsylvania.

Q. In your judgment, as a railroad man, state whether or not it is proper and safe railroading to place unvestibuled among vestibuled cars in the same train?

581 A. I see nothing unsafe about it. We have always considered it good practice, because we do it.

Q. In your experience have you ever had accidents caused by or attributed to such order or arrangement of your vestibuled and nonvestibuled cars in a train?

A. No, sir.

Mr. VOORHEES: I object to that, and move to strike out the answer, for the same reason that I objected awhile ago, that the question as to whether accidents happened on those roads is entirely aside from any issues in this case, and sheds no light upon any point in the case.

(Overruled. Exception allowed plaintiffs.)

Cross-examination.

(By Mr. VOORHEES:)

Q. Mr. Newell, this vestibule system has been in operation in Chicago for a number of years upon the roads running out from Chicago, has it not?

A. Yes, sir.

Q. Since the World's Fair year anyhow, since 1892?

A. Yes, sir.

Q. And your Lake Shore Limited has been in operation from a time long anterior to the 13th day of November, 1898, has it not?

A. Yes, sir.

Q. The Lake Shore train is a train that is solid, as you say?

A. Yes, sir.

Q. And so advertised?

A. Yes, sir.

Q. And the traveling public advised that there is no break in that train, that is, that it is solidly vestibuled; isn't that true?

582 A. I believe the advertisement says it is a solid vestibuled train. I can, by reference to the folder there, say.

Q. What this folder suggests is the character of the advertisement which you carried in connection with that train prior to the 13th of November, 1898, isn't it?

A. I don't remember just how that reads now.

Q. Well, isn't it true, Mr. Newell, that prior to the 13th of November, 1898, this Lake Shore Limited was advertised as follows: "The entire train is lighted by electricity and the illuminations include the Gibbs patent electric berth light, an arrangement whereby the berth interior can be lighted or darkened to suit the convenience of the traveler. All cars have the standard wide vestibules."

A. If our new train was running at that time, it was so advertised. I have forgotten just now when we built our new train.

Q. The old train, as contradistinguished from the new train, was running from the 13th of November, 1898?

A. Yes, sir.

Q. And that was vestibuled?

A. As a rule there were times when we had extra business that we had to use nonvestibuled cars, but very seldom.

Q. Very seldom?

A. Yes, sir.

Q. It was a very decided exception to see a nonvestibuled car?

A. In that train.

Q. And you didn't make a practice of using, of setting into that train unvestibuled cars day after day?

A. No, because we had regular cars assigned to that train, and it seldom required extra service.

583 Q. Isn't it true, Mr. Newell, that upon all the roads running out from Chicago, ever since 1892, the solid vestibuled train has been in general use?

A. No, I cannot say that it is. It may have been advertised as such but there are a great many exceptions to the solid vestibule.

Q. You are in the habit of advertising them as solid vestibuled and running them otherwise?

A. It has been done.

Q. You say it has been done?

A. I don't know whether our 10:30 train is advertised as a solid vestibuled train or not. By reference to the folder I can tell.

Q. I am speaking of the time anterior to the 13th of November, 1898, from 1892 up?

A. As far as the method of advertising the train is concerned, I cannot say because I do not pay very much attention to such advertisements, as they are put out by the passenger department.

Q. Isn't this true, Mr. Newell, that the practice of all the roads running out of Chicago—that on practically all of the roads running out of Chicago, since 1892, that the solid vestibuled train has been in general use upon the roads, one or more trains upon each road going out from Chicago solidly vestibuled each day?

A. I don't think so.

Q. Well, to what extent would you say the solid vestibuled train has been used upon the roads?

584 A. The solid vestibuled train was first introduced by the Pennsylvania railroad, if I remember correctly, some years ago, on their limited.

Q. Fifteen years ago, isn't it?

A. I don't know how long ago.

Q. In the '80's?

A. I couldn't say when they began running their trains that way.

Q. Long prior to the 13th of November, 1898?

A. I think so; and the Lake Shore has run their limited as a vestibuled train as a rule, that is, with few exceptions; but as a vestibuled train, for several years. Those are the only two solid vestibuled trains that I know of that have been running regularly.

Q. Well, don't you know that that is true with reference to the trains run on the Baltimore & Ohio from here to New York?

A. I have seen the Baltimore & Ohio trains a great many times, and I have frequently seen nonvestibuled cars in them.

Q. Are not there one or more trains that go out of Chicago every day here, solidly vestibuled, on the Baltimore & Ohio?

A. They have a train that leaves here at 10:20 in the morning, which I have seen, and as a rule that has been vestibuled.

Q. Solidly vestibuled, and was so prior to the 13th of November, 1898?

A. I don't know as to that.

585 Q. Now, isn't it true that the Northwestern line prior to that time was running a solid vestibuled train between here and Minneapolis?

A. I don't know; I am not familiar with the practice of the western roads.

Q. Don't you know it to be true that the Pioneer Limited was put in service on the Chicago, Milwaukee & St. Paul prior to the 13th of November, 1898, and it was advertised and run as a solid vestibuled train?

A. I don't know when it was put on.

Q. You know it has been for a number of years run as a solid vestibuled train, do you not?

A. No, sir; I have never seen it.

Q. Don't you know the same thing with reference to the Burlington?

A. I have never seen their train.

Q. Have never seen their train?

A. No, sir.

Q. Isn't it true that the Rock Island route, which runs into your depot, advertises solid vestibuled trains and runs them as such, and has done so since a time anterior to the 13th day of November, 1898?

A. The Rock Island had a solid vestibule train for a short time, called their—I think it was their Rocky Mountain Limited, or some such train, that they put on to Denver, which was solidly vestibuled. That train did not run very long to my knowledge.

Q. That was prior to the 13th of November, 1898?

A. I cannot say whether it was or not. It was at a time when there was competition between western lines on Denver business; but the Rock Island road advertised to run some solid vestibuled trains, but I couldn't say they did. I have seen their trains, and I very frequently see nonvestibuled cars in them.

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Q. And when there was competition for business, Mr. Newell, that resulted in the putting into service of the solid vestibuled trains, and advertising them as such, did it not?

A. I spoke in that way merely from general hearsay. I am not in a position to know the real reason why it was done.

Q. Don't you run the Lake Shore Limited because of the competition of other roads who are running solid vestibuled trains, and advertising them to be such, isn't that the reason you put on the Lake Shore Limited?

A. Why, I don't know why it was put on originally. It has been running for a great many years, the Lake Shore Limited.

Q. Isn't it true that a train that is solidly vestibuled is safer, both from the railroad man's standpoint and from the passenger's standpoint?

A. I cannot see wherein it is safer.

Q. Cannot?

A. No, sir.

Q. Isn't it true that the platforms of the cars are thoroughly enclosed?

A. Yes, sir.

Q. Completely enclosed?

A. Yes, sir.

Q. Isn't it true that upon that train you run a dining-car service?

A. Yes, sir.

Q. And a buffet-car?

A. Yes, sir.

Q. Which is a library-car and a writing-car and a car in which cigars and all the creature comforts, outside of mere provender can be obtained, isn't that true?

587

A. Yes, sir.

Q. And do you not give the traveling public to understand that passengers upon that train may pass freely and without interruption back and forwards over the platforms going to and from the sleepers and the smoking-car and to the dining-car?

A. I believe the advertisement says something of the kind.

Q. Isn't that true in practice?

A. That they can pass through?

Q. Yes, sir; and you hold out to the public a standing invitation to pass and repass over those platforms as it suits their pleasure or convenience so to do; isn't that true?

A. If you wish to interpret the advertisement so, yes.

Q. You never stop anybody who wants to pass back and forwards between the sleepers and the cars of convenience which you carry upon the train?

A. We don't stop them on any train, sir, where they have a right to go from one to the other.

Q. And the way is perfectly open and free, isn't that true, Mr. Newell, that the passenger way across those platforms could be made of greater safety to the passenger in every respect if the passage-way was entirely enclosed, so that no matter what the rate of speed, there would be positively no danger of being thrown from the cars; would that make the passenger-way safer?

588 A. The question of safety of the vestibule appliance is one I have never considered.

Q. You have never considered it?

A. No, sir; I have not considered it in the light of safety.

Q. I ask you whether or not under the conditions supposed, in view of the presence of this dining-car, your smoking-car, and your library-car, and the invitation to pass and repass, I will ask you as to whether as a matter of fact the fully and completely enclosed character of the platform would not impart a greater degree of safety to the passenger in accepting this invitation and crossing the platform. I am asking you as a fact. I want your opinion about that. Isn't that true?

A. It makes it more convenient to go across. So far as the element of safety is concerned, I don't see where it enters into it.

Q. You don't?

A. No, sir.

Q. Wouldn't the enclosed condition of the platform make it less liable for a passenger to be thrown off of the train, if the train was rounding a curve, for instance, with the lateral motion which would accompany the passage around the curve, wouldn't it make it safer?

A. There would be an obstruction there to prevent a man going off, if he didn't have hold of anything.

Q. Precisely; and would consequently make it safer for the passenger, wouldn't it?

A. It would make it safer in that the passenger would not be required to exert a due diligence in crossing the platform.

589 Q. What do you mean by exerting due diligence in crossing the platform?

A. I mean this, a man should do what occasion requires.

Q. And if your platform is thoroughly enclosed, there is no occasion for him to do anything except to walk across the platform, isn't that true?

A. Yes.

Q. That is true to that extent, it would be very much safer than if the platform was not guarded by those vestibules?

A. It is safer, as I said before, it is safer, because if there is a jolt, if there is an obstruction there it will stop him.

Q. Is there any other system of guarding or enclosing the platforms or passenger coaches or sleeping-cars than the vestibule system?

A. Not in use with us.

Q. There is no other system, is there, except just a system of iron gates?

A. I have seen gates and chains on some roads. We do not use them.

Q. And the only protection—the only guard, I should say—upon the ordinary railroad platform, for the passenger, outside of the vestibuled system, or system of gates or chains, are the railings which run along the body of the car and down to the end of the step to which he may take hold, and those railings are upon all the cars that have ever fallen under your observation?

A. Yes, sir.

590 Q. What other road do you say, Mr. Newell, runs into your depot?

A. The Chicago, Rock Island and Pacific, and the New York, Chicago & St. Louis, otherwise known as the Nickel Plate.

Q. Isn't it true that upon the Nickel Plate they had running solid through trains from a time anterior to the 13th of November, 1898?

A. They have been running what they call solid trains, but they have not been vestibuled trains.

Q. They have not been vestibuled trains?

A. No, sir.

Q. A portion of the trains have been vestibuled? They haven't advertised the Nickel Plate, as I understand you, it has not advertised, and didn't prior to 1895?

A. I don't know anything about their advertisements.

Q. Prior to November, 1898, did they run any solid vestibuled trains?

A. I don't know whether they advertised them or not.

Q. You stated, I think, in answer to a question on direct examination, that you could see no reason why it would not be perfectly safe to run unvestibuled cars in connection with vestibuled cars. Did you answer that question from the standpoint of a railroad superintendent, or from the standpoint of a passenger upon your road?

A. Both, because I am a passenger very, very often, and have occasion to walk over unvestibuled platforms.

591 Q. Would you regard it as perfectly safe railroading, Mr. Newell, to advertise a train as solidly vestibuled, and inviting the traveling public to pass at their will across the platforms to and from their cars, to the dining-car, where but one train a day was run over the road, and then make that train up by putting in a smoker in connection with a day-coach, an ordinary day passenger coach, and vestibule both of the platforms between those two coaches, following the passenger coach with an unguarded and unvestibuled car, and following the unvestibuled car by the dining-car, and then running that train around a six or seven degree curve at the rate of sixty to seventy miles an hour, would you regard that as safe railroading?

A. Well, you say regard it as safe railroading?

Q. To the passenger?

A. To do something that you—fail to do something that you advertised?

Q. I ask you.

A. Is that what you mean?

Q. That is one of the elements.

A. Yes, sir. Well, we know this, that very frequently a case arises whereby we are physically unable to do what we advertise to do, and it is impossible to give notice to everybody that we are not doing what we advertised to do on that day and date, and I consider that it is the duty of a passenger to take particular precaution under all circumstances.

592 Q. Now, will you please answer my question, Mr. Newell, whether or not you regard, under the conditions supposed, that is safe railroading not to set that car in on a certain day and date, but to set it in there every day and all the time, after having advertised the train as a solid vestibuled train?

A. Why, the feature of the information carried in advertisements, as governing the action of passengers, is one I never considered at all.

Q. Can you answer my question as to whether or not that would be safe railroading? That is the question. I am not asking you about what you consider the advertisement, or what your view upon that point is. I am asking you whether or not under these circumstances you would consider that as safe railroading. That is the question.

A. I don't see wherein the fact that there is a non-vestibuled car in there makes an element of danger.

Q. I will ask you again if you will answer my question, whether under those circumstances you regard that as safe railroading?

A. Yes, sir; I do.

Redirect examination.

(By Mr. KEELER:)

Q. Mr. Newell, are devices provided by railroads for the purpose of relieving passengers from the necessity of using their senses to

protect themselves while passing over the platforms of trains while in motion?

A. No, sir.

593 Q. Now, you have been asked if the use of vestibules in a passenger train was not a greater safety to passengers passing over the platforms while the trains were in motion. Do you mean that the use of the vestibule would relieve to some extent the passenger of the use of his senses to protect himself which otherwise he might have to exercise?

A. Why, no, it is a convenience.

Q. Was the primary or principal object of the vestibule device to enable passengers to cross the platforms of cars, or was it for other purposes?

A. My idea of the vestibule is a matter of convenience; it makes it more comfortable for the passenger to cross a platform of a moving train. The original vestibule was put on mail-cars to enable mail clerks to carry their bundles, papers, letters and so forth in their arms and protect them from the wind so that they could get across easy.

Q. You have been asked about the Pennsylvania Limited and the Lake Shore Limited; are both of those trains special trains, charging extra fare and carrying only first-class passengers?

A. Yes, sir; special tickets are required. Mileage books and other forms of reduced transportation are not accepted.

Deposition of A. J. HITT was read, as follows:

Direct examination.

(By Mr. KEELER:)

Q. Mr. Hitt, please state your name, age, residence and business.

594 A. A. J. Hitt; fifty-one years of age; general superintendent of the Chicago, Rock Island & Pacific railway; residence, Chicago.

Q. About how many miles of railway does your company operate in the West?

A. Thirty-eight hundred—between thirty-seven and thirty-eight hundred.

Q. Extending through what States?

A. Illinois, Iowa, Missouri, Nebraska, Kansas, Colorado and Indian Territory.

Q. To what extent have you supervision and control of the operation of the road and the passenger trains over it?

A. I have charge of the entire line.

Q. How many years' experience in practical railroading have — had *you?*

A. Nearly thirty.

Q. State briefly what positions you have filled in the railway service.

A. All the positions?

Q. Yes, briefly.

A. I have served as a brakeman, switchman, yardmaster, agent, conductor, assistant train master, division superintendent, assistant general superintendent, and latterly as general superintendent.

Q. On and prior to November 13th, 1898, did the Rock Island road operate through, as well as local passenger trains over its system?

A. Yes, sir.

Q. Did it operate in such trains tourist sleeping-cars?

A. Yes, sir.

Q. To what extent did your road run tourist sleeping-cars upon its through trains?

A. Prior to 1898?

Q. Prior to November 13th, 1898?

A. That is a year ago last November, wasn't it?

595 Q. Yes.

A. Why, at certain seasons of the year we had a double weekly service, twice a week in either direction.

Q. Between what points?

A. Well, we were only a part of the line. Our line reached from Chicago—one line to San Francisco, and another line to Portland; but we were just west end of it—the lines continued with our eastern connections.

Q. The east end of it?

A. Yes, sir.

Q. Did your road run through tourist sleepers between Chicago and San Francisco and Portland and west coast points?

A. Yes, sir.

Q. Were those tourist sleepers generally vestibuled or not?

A. No, I never saw one vestibuled.

Q. State whether or not it was the practice of your road on and prior to that date to run unvestibuled as well as vestibuled cars in the same train.

A. Yes, we frequently do that.

Q. State whether or not that was a common and general practice of your road.

A. It has been ever since we commenced the vestibule equipment.

Q. Did that practice apply to passenger-cars, sleeping-cars and tourist-cars only?

A. Yes, sir.

Q. What was the practice of your road with reference to the order in which vestibuled or unvestibuled cars were placed in the same train, if there was any?

A. Well, we have always had a regular manner of making up the train. The trains were so made up regardless of whether the cars were vestibuled or not.

596 Q. In making up and running your trains, was that order changed at all by reason of the fact that certain cars in the train might be unvestibuled and other cars vestibuled?

A. No, there was other reasons for it, for changing the makeup of the train. By that I mean the arrangement. I might say in ex-

planation, in speaking of changing the arrangement of the makeup of the train, it refers to this: The old method of making up trains was to haul the sleeping cars behind. More recently we have changed the practice and the sleeping cars are all ahead.

Q. Was it or not a common practice to have unvestibuled cars in the body of the trains in connection with vestibuled cars?

A. It was quite a common practice with us.

Q. What has been your observation in that respect among other well managed roads in the West?

A. I noticed our neighboring roads following the same practice.

Q. Please name the roads you refer to?

A. Oh, the Milwaukee, or the Burlington, or the B. & M., or the Union Pacific—some roads that are parallel and run alongside of us, and we see the trains from our own track.

Q. Where you run tourist-cars which you say are unvestibuled, what is your practice as to the part of the train in which they are placed?

A. Our practice is to haul them on the rear at all times.

Q. Why is that done?

597 A. Well, I should say for one reason that they are more out of the way there than they are elsewhere. So far as our own line is concerned, that was the practice when I came to the road, and I have never seen any reason for changing it.

Q. In your judgment as a practical railroad man, is it or not safe and proper railroading to place unvestibuled cars in connection with vestibuled cars in the same train?

A. We consider it safe, otherwise we would not follow the practice.

Q. In the practical operation of your road have you found that practice safe or otherwise?

A. It has been safe thus far.

Q. In your judgment state whether or not safe and proper practice of railroading requires unvestibuled cars to be placed in any particular portion of a train for safety?

A. I would say not. I cannot conceive of any particular position that you could put the car in to better the condition any.

Cross-examination.

(By Mr. VOORHEES:)

Q. Is it not true, Mr. Hitt, that the vestibule system has been in operation upon the roads running out of Chicago for a number of years?

A. To some extent, yes, sir.

Q. The vestibuled train has been in general use upon the roads running out of Chicago since 1892, the year of the World's fair, has it not?

A. Many of their trains are vestibuled.

598 Q. Many of the trains are vestibuled?

A. Yes, sir.

Q. Isn't it true that on most, if not all the roads running out from

Chicago, since 1892, that one or more trains have been dispatched which were solidly vestibuled?

A. I think it is true that each road has vestibuled arrangements for and had one or more vestibuled trains and have provided the equipment for such trains.

Q. For a solidly vestibuled train?

A. Yes, under ordinary conditions, when all their equipment was in commission, when they had no extra rush that required no more than the ordinary trains, the train was run as a vestibuled train. At times when one or two or three extra trains were needed they would not; but the general idea has been to provide vestibuled trains.

Q. And the general rule was to run it solidly vestibuled?

A. Yes, sir.

Q. That was the general rule?

A. The general rule, yes, sir.

Q. When it was run otherwise, it was the exception?

A. Well, it might be the exception, and yet it might be so regular a thing that it would occur every day, and I know of trains that, so far as through business was concerned was a solid vestibuled train before, and by reason of local business would have to have one or two nonvestibuled coaches over a portion of the line, which were simply put in as long as the extra travel lasted and then taken out and put into solid vestibuled trains.

599 Q. Now, you dispatch over the Rock Island road—over your road, solid vestibuled trains, do you not, every day, and it is your aim and purpose to keep that train solidly vestibuled, is it not?

A. So far as I can, yes, sir.

Q. And the general rule is that it is so kept?

A. Yes.

Q. Is that true?

A. Yes, in the majority of cases there is such a train.

Q. Upon a train of that character you carry a diner, and do you carry a buffet-car in addition to the diner?

A. There are two of them that carry a buffet-car.

Q. When I speak of buffet-car, I mean the library-car and the car with lounging chairs.

A. There are two; there is one for Colorado and one for Texas, daily.

Q. Upon those two trains you speak of, that you dispatch over your road, in a solid vestibuled condition, there is a standing invitation to your patrons, or passengers traveling on those trains, to pass and repass uninterruptedly over the platforms, going to and from the dining-car and the library-car and the lounging-car, isn't there?

A. Only Pullman passengers go to the library-car.

Q. What passengers?

A. Occupants of the Pullman cars.

Q. All passengers go to the dining-car?

A. If they wish; yes, sir.

Q. If they wish and at any time that they desire to go, isn't that true?

A. No, there is the regular meal hour, after which the car is closed to the public.

600 Q. All other times, if a man wanted to go there to purchase a cigar, wouldn't he be permitted to do so?

A. He probably wouldn't find anybody there.

Q. If he did find anybody?

A. If the steward was there and he could get into the car he would sell him a cigar; that is what he is there for.

Q. That is permitted at all times?

A. Yes, sir.

Q. That is, a passenger would not be stopped from going into the dining-car?

A. If he is sober and orderly.

Q. And that was true at all hours of the day when the dining-car was on the train. Was that dining-car carried straight through? Did you carry it on that train day and night?

A. We don't carry any diners through. We pick them up, serve certain meals and drop them.

Q. In other words, you don't take a diner at Chicago and carry it clear through to Colorado?

A. No, sir.

Q. You don't follow the same course as they follow on the Northern Pacific, pick a diner up at St. Paul and carry it through to Portland?

A. I don't know their practice.

Q. That is not your practice?

A. We don't haul a diner through anywhere. We haven't got a through diner-car on our road during the night.

Q. Don't you regard the presence of the vestibule which encloses the platform as a measure of safety to the traveling public

601 who are invited to pass and repass over those platforms going to and from the dining-car and from the library-car?

A. Oh, it would be a safer proposition for a child or for an old decrepit person, no question about that.

Q. Wouldn't it be a safer proposition for any one with a train running at a tremendous rate of speed around heavy curves?

A. I would say, to a man in full possession of his faculties, possessing normal strength, no. While there might be danger of his losing his hat without a vestibule, there would be practically no danger to a man in normal condition falling off.

Q. Might a man who is passing across a platform of a train going at sixty or seventy miles an hour, and striking a six or seven degree curve, might it not be possible for that man in his normal senses to lose everything as well as his hat?

A. I think not. I am judging that from the fact that we have run these trains so many years and still so many of them, without vestibules, and it is very, very rarely that anybody falls off.

Mr. C. S. VOORHEES: I move to strike that answer out, all except the words "I think not," as not responsive to my question.

(Motion denied. Plaintiffs allowed an exception.)

Q. Isn't it true, Mr. Hitt, that if a train on your road were running at the rate of say sixty, sixty-five or seventy miles an hour, striking a seven degree curve, with one of your passengers
602 on the platform at the time, isn't it possible, I say, that the passenger might be thrown from the track more than a hundred feet by the momentum of such speed on such a curve?

A. I don't know how far he would be thrown. Of course, if he is standing there unbraced, without having hold of anything, it is possible he would be thrown off, even at half that speed.

Q. Isn't it possible he would be thrown off even if he had hold of the iron railings?

A. I don't know how he could.

Q. You do not?

A. Because every vestibuled train we run—we have a number that are nonvestibuled—and we are not having people falling off, blowing off or rolling off.

Q. So because they have not fallen off or blown off or rolled off of your car, of your train, you think that it would not be possible for them to blow off or roll off or fall off of another train running under the conditions that I have spoken of?

A. No, I figure it would be reasonably safe without the vestibule, because that practice has been in vogue for many years, and all the railroads all over the country are still using nonvestibuled cars, and that certainly proves conclusively that it is reasonably safe.

Q. It is not necessarily true, however, that the fact that the platforms are enclosed adds a degree of safety to railroad travel?

A. Oh, there is no question about that.

Q. It is a safety appliance in that way?

A. Well, a railroad man would figure that the safety con-
603 sists more in its preventing the cars from telescoping in wrecks than it does preventing the falling off of the platform.

Q. Will you tell me how the presence of the doors by which the platforms are enclosed would add anything in preventing the train from telescoping?

A. Why, the iron frames of the vestibule protects it.

Q. I am asking you what effects the doors have, enclosing the platforms, what effect they would have in preventing it from telescoping?

A. The doors are part of it. It all adds to the strength.

Q. But the principal strength of the appliance in preventing the cars from telescoping is to be found in the steel buffers, the steel springs right between the two platforms, isn't it?

A. You can have the steel springs without the vestibule. We did have the buffer long before we had the vestibule. In fact we have always had buffers; but of course, the chief source of safety and strength is in the vestibule frame which comes clear to the top of the car. The buffer we always had.

Q. So that the wooden doors at each side of the platform don't

add very much to the strength when it comes to the prevention of telescoping?

A. The doors don't add very much to it. It is a part of the whole.

604 Deposition of A. W. SULLIVAN was read, as follows:

Direct examination.

(By Mr. KEELER:)

Q. Mr. Sullivan, please state your name, age, residence and business.

A. Albert W. Sullivan; forty-six years of age; residence Chicago; business general superintendent of the Illinois Central Railroad Company.

Q. How many years' experience have you had in railway operation, and generally in what positions?

A. Thirty years' experience; about fifteen years in the mechanical department, and in charge of the construction, operation and maintenance of cars and locomotives, and fifteen years in the transportation service as superintendent and general superintendent.

Q. About how many miles of railway does your road, the Illinois Central operate?

A. Five thousand miles.

Q. Extending into or through what States?

A. Extending through the States of South Dakota, Minnesota, Iowa, Wisconsin, Illinois, Indiana, Tennessee, Kentucky, Mississippi and Louisiana.

Q. On and prior to November 13, 1898, did your road operate through trains over its system?

A. Yes, sir.

Q. Did it also operate upon through trains, so-called tourist sleeping-cars, destined for the Pacific coast?

A. Yes, sir.

605 Q. Over what lines of your road were such tourist-cars run?

A. Over the lines from Chicago to New Orleans and from Louisville to New Orleans.

Q. What road carried such cars from New Orleans to the coast?

A. The Southern Pacific road.

Q. State whether or not such tourist-cars run over your road for Pacific Coast points, were vestibuled or not.

A. They were nonvestibuled cars.

Q. Are you familiar with the device of vestibules for passenger, tourist and sleeping-cars?

A. Yes, sir.

Q. Will you state, as near as possible, about what proportion of the passenger equipment of your road was vestibuled on and prior to November 13, 1898.

A. November, 1898, nine per cent. of the passenger equipment

was vestibuled, the total equipment being six hundred and seventeen (617) cars, fifty-six cars were vestibuled.

Q. What has been the practice of your road with reference to running nonvestibuled passenger, tourist and sleeping-cars, together with vestibuled cars in the same train?

A. It is a usual practice to do so.

Q. State, if you know, whether such practice has been common and general among western roads.

A. Yes, sir; it is quite common.

Q. In your judgment as a practical railroad man, state whether or not such practice is proper and safe railroading.

A. I can say it is entirely proper, and a perfectly safe practice.

606 Q. State whether or not such practice of running nonvestibuled in connection with vestibuled cars in the same passenger train is regarded as safe and proper railroading among well regulated railroads in the West.

A. Yes, sir, it is.

Q. When your road runs such nonvestibuled with vestibuled cars in its passenger trains, what is your practice with reference to the particular position in which the nonvestibuled cars are placed in such train?

A. We put the nonvestibuled cars anywhere in the train that the service in which these cars run requires that it should be placed; either on the forward end or the rear, or in the middle according to circumstances.

Q. On and prior to November 13, 1898, was such the practice and had it been general upon your road?

A. It was general at that time, and is general to-day.

Q. State, if you know, whether or not such practice last mentioned also existed upon other well managed railroads?

A. Yes, sir, it did.

Q. In your judgment, state whether or not such arrangement of nonvestibuled cars, for instance, in the center or in the body of passenger trains, was safe and proper railroading?

A. I consider that the placing of nonvestibuled cars anywhere in the train is entirely safe and proper railroading.

Q. State what other railroads occupy the Illinois Central terminals and depot in Chicago.

A. The Michigan Central; C. C. C. & St. L., known as the "Big Four," and the Wisconsin Central.

607 Q. Is your office located in the general depot used by the Illinois Central and the other roads you have named?

A. Yes, sir.

Q. Are you generally familiar with the makeup of passenger trains run out of the Chicago depot by those other roads?

A. Yes, sir.

Q. State what has been the practice of those roads with reference to the use of nonvestibuled with vestibuled cars in other passenger trains running out from Chicago.

A. My observation is that the cars are used indiscriminately, ves-

tibuled and nonvestibuled mixed, although there is an effort to keep the vestibuled equipment together for the sake of the appearance of it.

Q. Where the vestibuled portion is kept by itself, has that been regarded or found necessary for the safety of passengers?

A. No, sir, it is entirely a matter of appearance.

Q. What has been the practice of those other roads in such trains, as to placing nonvestibuled cars in the body of their trains, that is not at either end?

A. There is no rule or practice against placing nonvestibuled equipment anywhere in the train; but it is a practice to endeavor to preserve the uniform appearance of a train, as far as possible, by putting cars of the same shape, form and class together. The considerations which lead this to be done are entirely one of appearance and effect. The question of safety has never entered into the placing of vestibuled or nonvestibuled equipment in trains, because
608 the nonvestibuled cars are considered just as safe as the vestibuled, and therefore they are used indiscriminately in the train, whenever it is necessary to do so, although there is an effort to keep the vestibuled together, in order to preserve an effective appearance.

Mr. C. S. VOORHEES: I move to strike that answer as not responsive to the question.

(Motion denied. Plaintiffs except.)

Q. In actual practice, state whether or not the placing of nonvestibuled cars in the body of a train containing vestibuled cars, has been found impracticable or dangerous to passengers.

A. It has been found neither impracticable nor dangerous.

Cross-examination.

(By Mr. VOORHEES:)

Q. Mr. Sullivan, the vestibuled appliance is not of very recent origin, is it?

A. It is a matter of ten years or so.

Q. Perhaps more than ten years, is it not?

A. It may be a little more; yes.

Q. The litigation that arose between the Wagner Company and the Pullman Company over the patent dated farther back than ten years, did it not?

A. That may have been so with reference to the sleeping-cars, but the use of the vestibule on other cars of the train is even more recent than ten years.

Q. Well, is it not true that the vestibuled appliance has been in general use upon the roads centering in Chicago and radiating from Chicago since the World's Fair year, 1892?

609 A. It has been in use, but I would say not in general use; it is in exceptional use.

Q. Is it not true, Mr. Sullivan, that the solid vestibuled train has

been in use upon all of the roads leading out from Chicago since the year 1892?

A. There have been such trains run but they are the exception.

Q. Do I understand you to mean, Mr. Sullivan, that upon all the roads in Chicago running through trains, that one or more trains, given out to the public as solidly vestibuled have been dispatched each day; isn't that true?

A. That is true upon some of the roads, but not upon all of them.

Q. Isn't it true upon the majority of them? I am speaking now of a period anterior to the 13th day of November, 1898.

A. I would say that the solidly vestibuled train, exclusively vestibuled train is, even to this day, an exception. In the general practice of railway passenger service, while such trains are run, they are but a small proportion of the total passenger trains that are run upon any or all of the roads.

Q. What you mean to say, Mr. Sullivan, to illustrate, if the Illinois Central dispatch from Chicago in a given day fifteen passenger trains, that perhaps one, two or three of those fifteen passenger trains might be solidly vestibuled?

A. No, I do not mean that, that even a lesser portion than that would be attempted to be solidly vestibuled, but the com-
610 pletely solid vestibuled train is the exception, because of the fact that such trains are not, as a rule, maintained—equipped as vestibuled trains through the length of their run.

Q. Isn't it true, that prior to the 13th day of November, 1898, that most of the roads dispatched through trains from Chicago advertised as solid vestibuled trains?

A. Yes, sir, they advertised it.

Q. That is true, is it not?

A. That is true with reference to some roads, yes, sir.

Q. And the majority of the roads dispatched through trains—isn't it true as to the majority of roads dispatching through trains?

A. I would hardly say as to the majority, but it is true as to some.

Q. Now, prior to the 13th day of November, 1898, the Illinois Central road was running solid vestibuled trains, was it not?

A. It was running vestibuled trains, yes, sir. Sometimes solid, sometimes not solid.

Q. Well, trains that were given out to the public as solidly vestibuled?

A. Well, I am certain about the vestibules but not certain about the solid part.

Q. Didn't you run a solidly vestibuled train from Chicago to New Orleans?

A. No, sir.

Q. From Chicago to Louisville?

A. No, sir.

Q. From Chicago to Indianapolis?

A. No, sir.

Q. Or from Chicago to St. Louis?

A. No, sir, no one of those trains has been a completely vestibuled train.

611 Q. Well, when I say "solidly vestibuled," I have reference to the passenger portion of the train. I am not speaking now of the mail-car, the baggage-car and the express-car, but the cars in the train in which passengers are carried. Were you not, prior to the 13th day of November, 1898, dispatching trains of that kind on the Illinois Central?

A. We were dispatching vestibuled trains, yes, sir, but in our practice we never recognize any necessity for maintaining the train as an absolutely and completely vestibuled train.

Q. Then, I understand you to say that the Illinois Central, prior to that time, did not advertise to the traveling public that they were running solidly vestibuled trains, or stating, the fact, to-wit, that they were running vestibuled trains, without qualification of the word solid?

A. Yes, sir, that is my impression, without referring to the records.

Q. Isn't it true, Mr. Sullivan, that within your knowledge of the railroad situation here at that time, prior to the 13th day of November, 1898, that the Pennsylvania Central had been dispatching a train to the East from Chicago which was solidly vestibuled, so advertised and so maintained?

A. Yes, sir, upon which they charged extra fare.

Q. Precisely.

A. An exceptional train; a limited train.

Q. They advertised that it was solidly vestibuled, and having so advertised they maintained it as such, that is true?

A. I presume so.

612 Q. It is also true that the Lake Shore and Michigan Southern ran a train which they advertised as solidly vestibuled and maintained it as such prior to the 13th of November, 1898?

A. I believe so.

Q. Isn't it true that the Baltimore & Ohio, prior to the 13th of November, 1898, dispatched several trains from Chicago in a day, which were given out to the traveling public as solidly vestibuled, and were maintained as such?

A. I think not, but I would not be certain about that.

Q. Isn't it true that, prior to the 13th of November, 1898, the "Big Four" which runs into your depot, were maintaining solidly vestibuled service?

A. Yes, sir.

Q. Advertised it as a solid, vestibuled train and maintained it as such; isn't that true, Mr. Sullivan?

A. Well, advertised it as a vestibuled train. I am not certain whether they included the word "solid."

Q. But it was in fact maintained as a solid vestibuled train, was it not?

A. The endeavor was to do so, yes, sir.

Q. Now, is not that also true of the Michigan Central that runs into your depot, at a time prior to the 13th of November, 1898?

A. During the time that they run their limited, yes, sir; but other times no.

Q. But there was a time when they advertised and maintained a solid vestibuled train, prior to the 13th of November, 1898?

A. To that extent, I think there was.

613 Q. Isn't it true that the Chicago & Great Western dispatched, prior to that time, a train which they advertised as solidly vestibuled, you know about that?

A. I don't know about that.

Q. Do you know whether that is true with reference to the Wabash?

A. No, I could not say.

Q. Do you know what the fact is with reference to the Santa Fe route? Do you recall, prior to the 13th of November, 1898, the train designated, "The California Limited," which was advertised to the effect that the entire train was vestibuled?

A. I have no definite impression or recollection of that fact.

Q. Have you any recollection as to what the fact was in connection with the Burlington route? Isn't it a fact that they dispatched and maintained solidly vestibuled trains between here and St. Paul, prior to the 13th of November, 1898?

A. I have been over the Burlington route from Chicago to St. Paul, and prior to that date, November, 1898, and I have seen vestibuled and nonvestibuled cars in the same train I have ridden in. Whether or not those trains were advertised as solidly vestibuled trains, I am unable to say.

Q. Well, is it not true that, prior to the 13th day of November, 1898, a train was dispatched on the Burlington route, which was advertised and maintained as a solidly vestibuled train? What is your knowledge, if any, upon that point?

A. I have no positive knowledge, nor any definite recollection as to that matter.

614 Q. Do you recollect, Mr. Sullivan, that prior to the 13th day of November, 1898, in the spring of 1898, the Chicago, Milwaukee & St. Paul put into service a train known as the "Pioneer Limited," which was advertised and maintained as a solid vestibuled train from Chicago to Minneapolis?

A. Yes, sir.

Q. Have you any knowledge as to the character of the equipment on the West Shore railroad, the western connection, as I understand it, of the New York Central, on which the "Continental Limited" and the "Empire State Express" was dispatched from Chicago eastward?

A. I have seen a great many passenger trains on the West Shore road, and have ridden upon them.

Q. Well, is it not true, Mr. Sullivan, that prior to the 13th day of November, 1898, trains were given out to the public as solidly vestibuled and maintained as such, were dispatched from Chicago over the West Shore road within your knowledge?

A. Not within my knowledge, no, sir.
Q. You simply don't know?
A. I don't know that.
Q. Do I understand you to say, Mr. Sullivan, that prior to the 13th of November, 1898, the Illinois Central was or was not dispatching one or more trains daily, which were kept solidly vestibuled?
A. It was not.
Q. It was not?
A. No.
Q. Now, upon those trains that we have been talking about, take, for instance, the "Pennsylvania Limited," take the "Pioneer
615 Limited," and other trains of that character which are advertised and maintained as solidly vestibuled, is it not true that upon those trains there is carried a dining-car, also a library car, which is a car of convenience for writing, a lounging-car, and that all of the passengers upon those trains are invited to enjoy the comforts and the luxuries of those trains just whenever they pleased, and in doing so they have free and uninterrupted access to and from the car across the platforms of those trains; isn't that all true?
A. That is a practice with some trains.
Q. Yes, sir. It is a practice with the trains that we have been talking about, is it not?
A. It is the practice on what is known as limited train service; yes.
Q. Limited train service?
A. Yes, sir.
Q. And the trains that advertised to run solidly vestibuled trains?
A. Not necessarily solidly vestibuled; rather the limited trains. They may or may not be solidly vestibuled.
Q. You never knew of the limited trains on the Pennsylvania being otherwise than solidly vestibuled, did you?
A. No, sir.
Q. Nor upon the Pioneer Limited?
A. No, sir.
Q. Nor the Lake Shore Limited?
A. Nor the Lake Shore Limited; those three trains that that condition applies to.
Q. And other trains of like character, does it not?
A. There are no other trains of like character.
Q. Do you know anything about the "Empire State Express"?
A. Yes, sir.
616 Q. Isn't that a vestibuled train through, from Chicago to New York?
A. No, sir.
Q. Is it not advertised as the fastest train in the world, and thoroughly vestibuled?
A. It is not between Chicago and New York; it runs between New York and Buffalo, and has no sleeping-cars.
Q. It runs between New York and Buffalo?
A. Yes, sir; it is a coach train.

Q. Don't you know, Mr. Sullivan, that the Lackawanna advertises here in Chicago upon the billboards, that it runs solid vestibuled trains—Delaware & Lackawanna?

A. I have seen their advertisement.

Q. Isn't it true that there is a big sign to that effect down upon Jackson street here in Chicago?

A. I have never seen it.

Q. Isn't it true, Mr. Sullivan, that this vestibule appliance directly and very decid-ly contributes, not only to the comfort and convenience of the traveling public, but to the safety of the traveling public?

A. I think it contributes to the convenience, in a great measure. There are also some features about it that are decidedly inconvenient. There are some features connected with the vestibule that contribute to the safety; and there are some that involve dangers which do not exist in the open platform car.

Q. Is it not true, Mr. Sullivan, that the fact that the platform is thoroughly enclosed adds a very great element of safety to the passenger who is passing from car to car, either going to the library-car or going to the dining-car, or any other part of the train, isn't that true?

617 A. As a general proposition, the vestibule serves the purpose of a convenience and comfort to the passenger more largely than it serves the purpose of its safety. It is considered in railway practice that the open passenger platform is a perfectly safe method of constructing car platforms, and the fact that the majority of the cars are so constructed at this time, demonstrates the opinion of the railway men as to that fact.

Q. I am asking you, Mr. Sullivan, a very simple question, which is, whether or not, in your opinion as a railroad man, the fact that the platforms are fully enclosed does not add to the safety of the passenger who, for his pleasure or comfort, convenience or necessity, is obliged to pass from car to car?

A. I will say yes, as to convenience and comfort.

Q. I will ask you if it does not add to his safety? Do you say no to that?

A. To that I would say not necessarily. It is not an essential to his safety; no, sir.

Q. I say, does its presence not add an element of safety to his passage from car to car—the fact that the platforms are fully enclosed?

A. Under certain conditions, yes.

Q. If one of your fast trains carrying these cars of convenience that we have described, to which a passenger desired to go, were running very fast around a sharp curve, the passage between the cars would be safer by reason of the enclosed character of the platform than if they were unenclosed, would it not, Mr. Sullivan?

618 Would there not be less likelihood of a lurch of the train throwing a passenger from the platform? In fact, would there be any likelihood at all of a passenger being thrown

from the platform in the presence of the vestibule which enclosed the platform entirely?

A. Under conditions of unusual character, yes.

Q. Let us suppose conditions of this character, Mr. Sullivan; take a passenger train—a long train—of anywhere from eight to one dozen cars, with all of the cars except the mail-car, the baggage-car and the express-car, vestibuled, with a single exception, such a train running around a six or seven degree curve at a speed of from sixty to seventy miles an hour, would you not regard the presence of the vestibule fully enclosing the platform under those conditions a very decided element of safety to the passenger who might accept the invitation to pass between the cars to and from the dining-car?

A. In the daytime, I would say, no- necessarily so.

Q. Isn't it true, Mr. Sullivan, that the presence of the vestibuled attachment has the effect of steadying the train, preventing the oscillation of the train, or preventing the lateral motion of the train? Isn't that true—having a steadying effect, does it not?

A. It is not true as to the vestibule; it is true as to the broad buffer which forms the base of the vestibule. That buffer can be used on cars without applying the vestibule to them, and is so used.

Q. But it is a part and parcel of the vestibule, is it not—vestibuled appliance?

A. The vestibule is built upon that part of the car, yes, sir.

619 Q. So that in going around a six or seven degree curve, at a rate of from sixty to seventy miles an hour, when the platforms were vestibuled with all of the attachments, the buffer that you have spoken of, there would be less throw of the train than if the platform was not vestibuled, would there not?

A. No, I think not. The throw of the train is due entirely to the tracks, and not to the construction of the car.

Q. Do you think, Mr. Sullivan, that one of the old-fashioned cars that were used before the vestibuled appliance was thought of, or dreamed of, would go around a six or seven degree curve, without any reference to the character of the track, with as little throw and with as little lateral motion as two cars joined together by the vestibuled appliance?

A. Yes, sir, I think so.

Q. One of the old-fashioned cars?

A. You mean nonvestibuled cars?

Q. Yes, sir.

A. I mean a nonvestibuled car will go around a curve just as easily, and ride just as steadily as a vestibuled car.

Q. Is it not entirely true, Mr. Sullivan, that a heavy train, a long train, whipping around a six or seven degree curve developes a tremendous throwing power?

A. No, sir.

Q. That is not true?

A. That is not true, on a properly constructed track.

Q. Isn't it true that if a man were thrown from a train running at the rate of sixty or seventy miles an hour around a

620 six or seven degree curve, that he would be thrown from the car a distance of more than a hundred feet from the tracks?

A. I cannot imagine such a condition as that, such a circumstance.

Q. You cannot imagine such a circumstance?

A. No, sir; it does not accord with my knowledge of what the causes and effects are in connection with the operation of trains.

Q. Isn't it true that the speed of a train will add impetus to a body falling from the train—the body would be thrown in the direction in which the train was moving, isn't that true?

A. Not in the slightest degree.

Q. And it would not be possible for a man to fall from the train under those conditions, and be picked up dead a distance of one hundred or more feet from the track, you think?

A. The train adds nothing to the impetus which the man already possesses when he is on it. He may fall off the train, but there is no way in which he can get a distance from the train except by some effort of his own over and above the momentum of the train.

Q. Assume, if you please, a man falling from a train, running in the manner I have suggested, striking a distance of from forty to fifty feet from the track, and being found dead, striking with his body on the rocks, a distance of, we will say, fifty feet from the tracks, crushing in his skull, and being picked up after that a distance of one hundred and eight feet from the track, would
621 you say that the speed of the train had nothing whatever to do with his landing that distance of one hundred and eight feet from the track?

A. That man being a passenger upon the train?

Q. Yes, sir.

A. The impetus his body would receive would be that of the normal movement or impetus of the train. There would be no superadded impetus by reason of any lurching over ascribed to passing around a curve.

Q. Then, we understand each other. You say that the great distance that I have supposed, which the body was found from the tracks, would be due to the great speed at which the train was proceeding?

A. It might be due to that effect, yes.

Q. We understand each other now. I had supposed that you had said otherwise. We are not apart at all. In the operation of your road, Mr. Sullivan, your first thought is for the safety of your passengers, is it not?

A. Yes, sir.

Q. Your first thought is for their safety, as against their comfort and convenience, is it not?

A. In the operation of a line, yes, sir.

Q. Their safety occupies a higher place in your thought than even their comfort or convenience, that is true, is it not?

A. Yes, that is true.

Q. And you naturally adopt those systems, and those appliances, those inventions, which add to the safety of the passenger, do you not?

A. Yes, sir.

Q. You are constantly doing so?

A. Yes, sir.

622 Q. Every new invention which is made, which contributes in any degree to the safety of the traveling public, when you are convinced of that, you adopt it, do you not?

A. Yes, sir.

Q. As all of the other great railroads through the United States do, that is true?

A. That is true, yes, sir, every approved device is put into use.

Q. Mr. Sullivan, will you just give me a brief description of this vestibule device? Explain how it connects the cars and the purpose that it serves.

A. There are two forms of vestibule, one known as the narrow vestibule and the other as the wide vestibule. They both serve the purpose of enclosing the platforms of the car on the sides. They are both provided with doors for the purpose of access to and egress from the cars. The wide vestibule encloses more of the platform than the narrow. They both form a covered passage from one car to another. They both serve the purpose of keeping the wind, the rain and more or less of the smoke and sparks and cinders from entering the cars when the doors are open. They also give shelter from the elements to the passengers in passing from one car to another. They are especially useful to the railroads in safe-guarding the train, that is, in preventing access to the train of unauthorized persons, and are of especial value in enabling the attendants of the train to better watch, guard and protect the property of the passengers who are riding in them by reason of preventing ready and general access to the cars. They give the train what is gen-

623 erally considered to be a more attractive appearance. They are considered decidedly more fashionable than the non-vestibuled equipment, and for that reason, being fashionable and popular, they are highly advertised by railroads, with a view of influencing travel their way. The practice of advertising vestibuled trains is sometimes overdrawn, the advertisement being beyond the actual character of the service.

Q. In other words, the advertisements,—the performance falls short of the advertisement?

A. The advertisements overstate, frequently, the character of the vestibule from an operative point of view. The operative departments exercise the utmost care in the equipment of the train as to its safety, but whether or not its appearance is always the best or the most fashionable, is a matter in which they have less concern than the passenger department of the road which does the advertising, and owing to the different points of view, there are sometimes discrepancies between the advertisement and the fulfillment, or the performance of it, but there is no difference in the conception of any department of a railroad as to what constitutes the safety of the service. In other words, the management endeavors to guarantee and protect the safety of the service, but not always the nonessential elements.

Q. Is it not also true, Mr. Sullivan, that the vestibule appliance

serves the purpose of rendering the train more safe by preventing telescoping in the event of a head-on collision, isn't that true?

A. That is a current and popular belief—a rumor.

624 Whether or not that is absolutely true is not a well demonstrated proposition in operative service.

Q. Has never been demonstrated, one way or the other?

A. Not satisfactorily; not exclusively so.

Q. It is a popular belief, you say?

A. It is so; yes, sir.

Q. So, a train is advertised as a solidly vestibuled train, the common thought is that that train is safer than one that is not solidly vestibuled?

A. That may be true, to some extent, I presume it is.

Q. Would it not also address itself to the public mind as being a safeguard, for the reason that it encloses fully the platforms, and thus reduces to the minimum the danger from passing from car to car? Isn't that another reason why the trains are advertised as solidly vestibuled?

A. It reduces some dangers, but it greatly increases others. The vestibuled car has dangers and risks of its own unknown to the non-vestibuled, which are well known to men in operative service.

Q. The presence of the vestibule not only reduces to the minimum but destroys and wipes out of existence altogether the danger of being thrown from the platform.

A. It is not true, unless the vestibule is kept closed.

Q. I mean a closed vestibule.

A. If a closed vestibule is not constantly kept closed, then the effect of the vestibule is misleading and more dangerous than a car without one.

Q. But, when a train is vestibuled, the purpose or intent

625 always is to keep the vestibuled doors closed, and maintain it as a vestibuled train, is it not?

A. The purpose and intent is to do so; yes, sir.

Redirect examination.

(By Mr. KEELER:)

Q. So far as the safety of passengers walking over car platforms of moving trains is concerned, does or does not the vestibule do more than to relieve such passenger from the use of his senses, and from exercising precautions for his own safety, which otherwise he would be required to use?

A. The effect of the vestibule is generally to make passengers less careful in their movements through the train.

Q. But was such vestibule introduced or used upon railroads for the purpose of preventing passengers from being thrown or hurled off of platforms of trains in motion between stations—was that or not one of the primary or important reasons of its adoption?

A. It was a reason; it was one of the reasons advanced by promoters of the vestibule at the time of its introduction along with numerous other reasons.

Q. In your through trains from Chicago to New Orleans, St. Louis, and to Omaha, in which you used nonvestibuled together with vestibuled cars, do you also run in the same trains dining-cars and library or buffet-cars?

A. Yes, sir, we do.

Q. On and prior to November 13th, 1898, were so-called tourist sleeping-cars run out of Chicago to the Pacific coast on different roads?

A. Yes, sir.

626 Q. Including your own road?

A. Yes, sir; I think so.

Q. When such tourist sleeping-cars are run, state whether or not they have generally been placed in what is known as through or as transcontinental trains?

A. As a rule, they are placed in the through trains.

Q. Were such tourist-cars generally vestibuled or nonvestibuled?

A. I have never known a tourist-car to be vestibuled. I have never seen one having a vestibule.

Deposition of W. C. BROWN was read, as follows:

Direct examination.

(By Mr. KEELER:)

Q. Mr. Brown, please state your name, age, residence and business.

A. W. C. Brown; forty-six years old; residence, Chicago, and business, general manager of the Chicago, Burlington & Quincy railroad.

Q. How many years' experience have you had in practical railroad operation, and generally in what capacities?

A. About thirty years, and in various capacities. I commenced work on a section. I have done some train work; telegraph operator, train dispatcher; trainmaster; division superintendent, and general manager.

Q. About how many miles of railway does your road, the Chicago, Burlington & Quincy operate?

A. You mean the entire system or the C. B. & Q. proper?

627 Q. I mean the entire Burlington system.

A. About 7,500 miles, approximately. I don't know exactly.

Q. Into and through what States does your railroad run?

A. Through Illinois, Wisconsin, Minnesota, Iowa, Missouri, Kansas, Nebraska, Colorado, Wyoming, South Dakota and Montana.

Q. On and prior to November 13th, 1898, did your road run so-called tourist sleeping-cars destined for the Pacific coast?

A. Yes, sir; they did.

Q. Were such cars vestibuled or nonvestibuled?

A. I don't think any of them were vestibuled. If there were any there was just an occasional one. To the best of my recollection there were none at that time.

Q. Were those tourist sleepers run on your through trains from Chicago west?

A. They were, yes, sir.

Q. And were they destined to various points on the Pacific coast?

A. They were.

Q. In the trains in which such tourists cars were run did you also have dining-cars, smoking or buffet-cars in the same train?

A. We had dining-cars, but I don't think at that time that any so-called buffet or composite cars were run.

Q. On such trains did you run sleeping-cars besides tourist-cars?

A. Yes, sir.

Q. What was the practice of your road on and prior to that date as to where such tourist-cars were placed in the trains?

628 A. There was no rule touching that point; they were run wherever they would come in the regular routine of business. If there was a car to be left at Galesburg, for instance, it would be put behind the tourist-car. The Omaha sleeper would be put behind the tourist-car so it could be dropped off without switching the tourist-car.

Q. Then, do I understand that tourist-cars and also dining-cars were placed in the body of the train?

A. Yes, sir.

Q. On and prior to November 13th, 1898, about what proportion of the passenger equipment of your road was nonvestibuled?

A. I could not answer that question with any accuracy. A large proportion though were nonvestibuled.

Q. You say a large proportion were nonvestibuled?

A. Nonvestibuled.

Q. In your through trains from Chicago to the West over various lines of your system did you at and before that time run nonvestibuled passenger, dining and sleeping-cars?

A. Yes, sir.

Q. State whether or not such was common or general practice of your road at that time.

A. It was. Just one moment—you make a distinction between tourist-cars and sleeping.

Q. Yes, I asked as to those first.

A. I would not want to testify that we were not running any sleeping-cars at that time that were not vestibuled, but most of the sleeping-cars were.

629 Q. Where you ran in through trains nonvestibuled cars together with vestibuled cars, what was your practice as to the order or arrangements in which those different kinds of cars were placed in the same train?

A. They were placed in what we term "station order," as explained, before the cars that were dropped off from the train to go, for instance, to Quincy, that car would be dropped off at Galesburg; a car that went to Keokuk would be dropped off at Burlington, and a car to stop at Omaha would be dropped off at Omaha. Those cars would be placed in other cars, and the question as to whether they

were vestibuled or nonvestibuled was not considered in making up the train in station order.

Q. Then was it not common and general practice on your road during that time to place nonvestibuled cars in the body of trains or between cars in the same train which were vestibuled?

A. That was the practice; yes, sir.

Q. In your judgment as a railroad man, state whether or not such practice was safe and proper railroading.

A. I regard it as entirely so.

Q. State if you know whether or not such practice last referred to was common upon other well-managed railroads.

A. It was common, yes.

Q. State whether or not among practical railway operators such practice was regarded as safe and proper railroading so far as safety of passengers was concerned?

A. It was; yes, sir.

Q. In practical railway operation, was it or not feasible and practical always to place nonvestibuled cars by themselves in any particular train?

A. It was not necessary, and is not.

630 Q. In actual practice state whether or not the placing of nonvestibuled cars in the body of a train containing vestibuled cars also has been found impracticable or dangerous to passengers on such trains?

A. No, sir, not in my experience.

Q. If you have ascertained now the proportion of your passenger equipment which was nonvestibuled on and prior to November 13th, 1898, please state it.

A. The proportion of cars equipped with vestibule upon that date on the C. B. & Q. proper was thirty and seventy-five hundredths per cent—say thirty-one per cent.

Q. Were vestibuled?

A. Were vestibuled; yes, sir.

Q. Then about seventy per cent. of your passenger equipment on the system proper was nonvestibuled?

A. Yes.

Cross-examination.

(By Mr. VOORHEES:)

Q. Mr. Brown, you are general manager of the C. B. & Q.?

A. Yes, sir.

Q. How long?

A. Since January 1st, 1896.

Q. And have been railroading—have been a railroad manager and superintendent and connected with railroads for thirty years?

A. About thirty years.

Q. The system of vestibules, Mr. Brown, has been in general use and constantly used in one way and another upon all the railroads running out of Chicago since the World's Fair year, 1892, has it not, at least since that time?

631 A. I think that the time of them commenced on Pullman cars about that time.

Q. Isn't it true in your knowledge that the use of the vestibule began really long prior to 1892?

A. No.

Q. Don't you recall that the Pennsylvania Central ran a limited train with solid vestibuled platforms as far back as 1885?

A. If that is true I don't recall it.

Q. Don't you recall that the Pennsylvania Limited went out in a solid vestibuled condition, was dispatched from Chicago every day in a solid vestibuled condition long prior to 1892?

A. I think it was used on the Pennsylvania road before that.

Q. And isn't it true Mr. Brown, that the solid vestibuled train has since 1892 been in general use upon nearly if not all of the roads dispatching trains from Chicago to the extent of one or more trains a day?

A. No, sir.

Q. It is not?

A. No, sir.

Q. Isn't it true that your road dispatched, advertised and maintained a solid vestibuled train between here and St. Paul prior to the 13th of November, 1898?

A. Yes, sir; I think in 1896 or 1897 we put on one train each way between Chicago and St. Paul that was vestibuled.

Q. And you maintained it as a vestibuled train, did you not?

A. Yes, sir.

Q. Was not that true prior to the 13th day of November, 1898, with the Chicago, Milwaukee & St. Paul, between Chicago and St. Paul?

A. I could not say.

632 Q. Isn't it true as to the Northwestern?

A. I don't know.

Q. Then, why, Mr. Brown, do you say that the solid vestibuled train was not in use upon very many of the roads dispatching trains from Chicago when you cannot tell me as to whether or not there was a train on the Chicago, Milwaukee & St. Paul and upon the Northwestern road at that time?

A. I understood you to say—your inquiry to be, whether they were not generally in use?

Q. I mean generally in use in the sense of running one or more trains each way each day, was the purport of my question.

A. I didn't understand it that way. I understood that the exceptional use is the general use. One train each day would be considered in general use.

Q. Isn't it true, then—I will ask you again, isn't it true that prior to the 13th day of November, 1898, upon all of the roads dispatching through trains from Chicago that there was one or more trains which was given out to the public—which were given out to the public—as solid vestibuled trains, and maintained as such, dispatched each way?

A. I think not. I think our first solid vestibuled train, and so advertised, was the train you refer to between Chicago and St. Paul.

Q. Prior to the 13th day of November, 1898?

A. I think prior to that. I know prior to November, 1898.

633 Q. Now, isn't it true, isn't that condition of things true with reference to the Chicago, Milwaukee & St. Paul?

A. I don't know.

Q. Wasn't it true with reference to the Northwestern?

A. I don't know.

Q. You don't know about that, but you do know it was true with reference to the Pennsylvania?

A. I think it was.

Q. Don't you know that it was true with reference to the Baltimore & Ohio, "the Royal Blue line," between Chicago and New York?

A. No, I do not.

Q. You don't know about that? Didn't the Wabash dispatch one or more solid vestibuled trains on its through run prior to the 13th of November, 1898?

A. I don't know that.

Q. You don't know about that. Isn't it true that the Santa Fe route ran from Chicago through, what was known as the California Limited, and that the entire train was vestibuled?

A. Well, I think they had, but I don't know the date that it was inaugurated.

Q. I am talking now of prior to the 13th of November, 1898?

A. No, I do not know.

Q. Isn't it true, Mr. Brown, that the Rock Island route dispatched solid vestibuled trains prior to the 13th day of November, 1898?

A. I don't know.

Q. You don't know about that? The Wisconsin Central was running vestibuled sleepers prior to the 13th day of November, 1898, was it not?

A. I think all of the roads were—through sleepers.

634 Q. You think all of the roads were using vestibuled sleepers?

A. To a certain extent. I don't think all the sleepers were then or are now vestibuled.

Q. Would you not say in that connection, Mr. Brown, that the vestibuled appliance was in general use upon all the roads which ran out of Chicago prior to the 13th day of November, 1898?

A. No; I should say it was in very limited use.

Q. I am talking about upon sleepers. I say, would you not say that it was in general use in its attachment to the sleeping-car equipment of the various roads radiating from Chicago prior to the 13th of November, 1898?

Mr. HANSON: You mean in general use upon all cars?

Mr. VOORHEES:

Q. I mean in general use on sleeping-cars.

A. I could not testify as to that. The majority of our sleepers at that time were equipped with vestibules.

Q. A large proportion were equipped with vestibules, were they not?

A. I think they were; a large proportion of them.

Q. Wasn't it true at that time, Mr. Brown, that you advertised the fact to be that the Burlington route equipment is all of the modern, comfortable pattern, with wide vestibules of steel and plate-glass between cars. Was not that your advertisement given out to the public at a date anterior to the 13th day of November, 1898?

A. Well, I don't know.

635 Q. That would have been true if it had been given out that way, would it not?

A. I think not. It would be true as applied to a very few of our trains at that date.

Q. Don't you know Mr. Brown, that prior to the 13th day of November, 1898, that the West Shore road was dispatching from Chicago eastward several trains which were solidly vestibuled?

A. What road, sir?

Q. The West Shore.

A. No, I don't know.

Q. Don't you know that the Continental Limited, which was advertised as a solid vestibuled train and maintained as such—I am speaking now of a time anterior to the 13th day of November, 1898. Don't you know that the Boston and New York Express, which was dispatched daily, was advertised and maintained as a solidly vestibuled train?

A. No, I do not.

Q. Is it not true that prior to that time that the Denver & Rio Grande dispatched between this city and St. Paul and Denver solid vestibuled trains which they advertised and maintained as such?

A. I don't know. I want to add to that if they had run any such trains they were some other connection than the Burlington. We had no such trains in connection with the Denver & Rio Grande at that time.

Q. Don't you know that they ran that kind of a train over the Nickel Plate that was advertised and maintained as a solidly vestibuled train?

A. No, sir.

Q. Did you at that time have any information, any knowledge, as to the character of the trains run on the Lehigh Valley road?

A. No, sir.

636 Q. You were not familiar then with the "Black Diamond" Express that ran from New York to Buffalo and which was advertised as solidly vestibuled, day-coaches and all?

A. No, sir.

Q. Were you familiar prior to the 13th day of November, 1898, with the train service of the Delaware & Lackawanna where it was advertised as the Chicago Vestibuled Express, solid vestibuled train?

A. No, sir.

Q. Isn't it true that the New York Central and Hudson River has from a time long anterior to the 13th day of November, 1898,

been running solid vestibuled trains advertised and maintained as such?

A. I never have ridden on their limited trains. I have ridden on a good many of their other trains, but I don't recall of having been on one of their through trains that was a solid vestibuled train.

Q. Now, isn't it true that they were prior to the 13th day of November, 1898, operating solid vestibuled trains on the New York Central and Hudson River road, within your knowledge?

A. No, not within my knowledge. It may be true. I think it is.

Q. Isn't it true that the "Big Four"—the C. C. C. and St. L.—prior to the 13th day of November, 1898, was operating trains which were advertised and maintained as solidly vestibuled, was it not?

A. That may have been, I don't know.

Q. You think it was, do you not?

A. I think perhaps it is true.

637 Q. Were you familiar prior to the 13th day of November, 1898, with the train known as the "Sunset Limited," that train from San Francisco to Los Angeles and from there to the East?

A. No.

Q. You don't know that that was a solid vestibuled train and had been maintained as such, advertised and maintained as such, since 1894?

A. No, sir.

Q. Don't you know that prior to the 13th day of November, 1898, the vestibule was in general use on the Iron Mountain road?

A. No, sir.

Q. And that they were running solidly vestibuled trains which were advertised and maintained as such?

A. No, sir, I don't know.

Q. Don't you know and have knowledge of that kind, to the effect that they were running solidly vestibuled trains prior to the 13th of November, 1898, over the Erie road?

A. No, sir.

Q. Didn't the Michigan Central in dispatching trains from Chicago prior to the 13th of November, 1898, advertise that they were running luxurious vestibuled fast trains?

A. They may have, I don't know.

Q. And isn't the same true of the Grand Trunk?

A. That may be so; I haven't any knowledge of it.

Q. Do you not know, Mr. Brown, within your knowledge, that prior to the 13th day of November, 1898, the Lake Shore and Michigan Central were running what is called "The Lake Shore Limited," and were advertising it and maintaining it as a solidly vestibuled train?

A. I presume so, though I never rode on the train.

638 Q. But your understanding is that that was the fact?

A. Yes, sir.

Q. You have said, I believe, that you didn't know whether the Baltimore & Ohio were doing that or not?

A. No, sir.

Q. The Baltimore & Ohio runs in competition, very sharp competition, does it not, with the Pennsylvania Central?

A. Yes, sir.

Q. Isn't it true, Mr. Brown, within your experience as a railroad man that the adoption of the vestibule device has been brought about by the sharp competition of the various competing roads that dispatch their trains from Chicago?

A. Oh, very largely, yes, sir.

Q. Isn't it true that when one road has advertised that they are solidly vestibuling their train, or adopting the vestibuled appliance or device, that other roads immediately take the necessary steps to do the same thing? Isn't that true?

A. Yes, sir; I think that is true.

Q. Isn't that largely brought about, Mr. Brown, by the sharp competition?

A. Very largely.

Q. And is not the understanding of railroad people and the railroads who adopt the vestibuled system that the traveling public will more readily become patrons of that road because it has equipped its cars with the vestibule device?

A. That is the purpose of doing it.

Q. That is the reason you do it. Now, one of the reasons, Mr. Brown, upon which a railroad company relies to attract the traveling public to it by the adoption of the vestibule appliance, is
639 that it is the popular belief and is the fact that the vestibuled device is a device contributing very largely to the safety of the traveling public?

A. No, I don't think that is true. I think that it contributes largely to the comfort of the traveling public.

Q. Why to the comfort, Mr. Brown, of the traveling public? The traveling public might remain in the car in which they are riding and not pass from one car to another at all, and so have no occasion to use a vestibule appliance to the comfort and convenience and not to the safety of the traveling public.

A. The reason I state that is that I cannot recollect a case in my own experience and observation where any danger came to passengers in going from car to car under the old arrangement. The new arrangement protects them from the weather, wind and dust, and it was adopted, so far as I know, and so far as my recommendation goes, not as a measure of safety, but as a measure of comfort.

Q. It is a measure of safety, though, is it not?

A. I should think perhaps it was.

Q. Isn't it very much safer to the traveling public to pass and repass across the platforms of a long train over an enclosed platform, fully and thoroughly enclosed, than it would be over a platform which was unenclosed?

A. There is no question about that.

Q. It would be safer, would it not?

A. Yes, sir.

Q. And it would be very much safer Mr. Brown, under
640 those conditions. Let us suppose a long train of from eight to twelve cars with all the passenger cars in the train vestibuled except one, that set into the middle of the train; that train running at the rate of from sixty to seventy miles an hour around a six or seven degree curve, carrying a dining-car, having extended to the traveling public, as all the railroads do that carry a dining-car, an invitation to the passengers to visit the car whenever it suited their convenience to do so, and the passenger accepts the invitation at the time when this train is rushing around a six or seven degree curve—I ask you whether under those circumstances his passage from car to car would not be infinitely safer if the platforms were fully enclosed by the vestibuled device than if they were not?

A. There is no question but what it would be safer.

Q. Then in point of fact, Mr. Brown, you would have no hesitancy in saying that amongst the other results accomplished by the use of the vestibule that the safety of the traveling public is not the least considered, that is true, is it not?

A. It would be a consideration, but it was not the consideration in adopting the vestibule. As a matter of fact, where the passenger has exercised ordinary caution there was no danger whatever. There was discomfort but no danger.

Q. But resulting from the adoption of the vestibule appliance is a decided measure of safety to the traveling public.

A. Well, it makes it safe for people who do not exercise any caution at all.

641 Q. Of course, Mr. Brown, you are animated, as every good railroad man is, with the purpose of making travel as safe as possible for the traveling public, that is true, is it not?

A. Yes.

Q. Your first consideration is the safety of your patrons, is it not?

A. Yes, sir.

Q. As contradistinguished from their comfort or their convenience, the first consideration is their safety?

A. Yes, sir.

Q. Now, upon the trains upon which you run dining-cars, do you run those dining-cars day and night?

A. In some cases we do, yes.

Q. Between here and St. Paul do you run them day and night?

A. We do not, no.

Q. Between Chicago and what point do you run them day and night?

A. Between Chicago and Denver we run them part of the way. I don't recall any case where a car runs continuously all night. We sometimes run it for a late supper and have to run some time into the night to get into a place where it will serve breakfast for the train the next morning.

Q. In your dining-car service you do not aim to carry a dining-car day and night—you pick it up at a certain point for breakfast, and when you get to a stopping point you cut it out, drop it off, and when luncheon time comes you pick up another car?

A. No, that car serves the three meals and then is set out.

642 Q. Mr. Brown, upon a train carrying a dining-car the traveling public is permitted to go to the dining-car at any hour that the dining-car is in service for the purpose of purchasing those things which that dining-car has for sale?

A. The dining-car is open only during certain hours when the meals are served. Between times it is being cleaned up to be in shape for the next meal.

Q. If a gentleman wanted to go to the dining-car and purchase a cigar it would be sold to him, would it not, at any time whether at meal times or otherwise, isn't that the customary rule?

A. I think perhaps he could be served then. I am not sure about that. But the car is run for the purpose of serving meals and selling whatever is sold incidental to the meals, and between times it is not open for the public.

Q. But the public would be permitted to go and purchase what is for sale there at any time other than meal time?

A. It is not in shape to serve the public between meal hours.

Q. I understand that to be the fact, but I say, if a gentleman goes to the dining-car and the dining-car conductor is disengaged, there is no rule promulgated upon your system which would prevent the dining-car conductor from serving the gentleman by selling him a drink of whisky, we will say, a drink of wine or a drink of beer or a cigar or a box of cigars if he desired to purchase them?

643 A. They would not sell him a drink of anything. They would sell him a bottle of whisky, but he would have to take it somewhere else to use it; and I presume he would sell him a cigar, although it would be an exception. It is not a rule to do it, and it would be simply as an accommodation to that gentleman.

Q. Well, I say, you have—there is no rule upon your road which prohibits it. While there is no rule, as I understand you, that expressly sanctions it, there is no rule that prohibits it?

A. I could not reply to that. I don't know just what the rules are of the superintendent of the dining-car service.

Q. Now, Mr. Brown, when the meals are announced as ready in the dining-car you have no rule which requires the train to be brought to a stop to permit the passengers to go to the dining-car?

A. No.

Q. And passengers are invited to go there regardless of the rate of speed at which the train is moving and regardless of the fact that the platforms are either vestibuled or nonvestibuled, that is true, is it not?

A. Yes, sir.

Q. And would you not say, Mr. Brown, that it would be decidedly safer in crossing those platforms, especially in rounding sharp curves, when proceeding at a high rate of speed, for your passengers, that the passage ways from car to car—the platforms leading from car to car—in their trip to the dining-car, should be fully enclosed?

644 A. I think it would be safer, but I think the passing through the nonvestibuled passageway would be entirely safe if ordinary caution was used by the passenger.

Q. Still you do say it would be safer if the platforms were vestibuled and enclosed in the way I have suggested?
A. I think it would.

F. W. GILBERT testified as follows:

Direct examination.

(By Mr. THOMPSON:)

Q. What are your initials, Mr. Gilbert?
A. F. W.
Q. What is your occupation?
A. Division superintendent of the Idaho division of the Northern Pacific.
Q. How long have you served in that capacity?
A. A little over ten years.
Q. State to the jury what familiarity, if any, you have with the line of railroad from Hope, Idaho, to Spokane, Washington?
A. I am personally well acquainted with it.
Q. State what the fact is as to whether or not your duties call you very frequently to pass over it both ways?
A. They do.
Q. How familiar were you with it during the year 1898?
A. I was perfectly familiar with it.
Q. How is the line located from Hope, Idaho, to Oden station, with reference to the lake and the lake bluff?
A. From Hope almost to Oden it is located on the sidehill and on the shore of the lake.
645 Q. And how is the track located as to the bluff being blasted out or any embankments made?
A. Well, it is sidehill, cutting, the hills cut out to make a fill on the other side, and some places they are filled, mostly what we term sidehill work.
Q. Have you received information or not so as to be familiar with the place where it was supposed Mr. Adams' body was found?
A. Yes, sir.
Q. I will ask you to state to the jury how the railroad is located at that point as to being upon this sidehill work that you speak of.
A. Well, it is sidehill and embankment there, I think.
Q. What is the character of the track or roadway from the westerly end of the Pack River trestle to Oden as to being kept in a high or poor condition during the year 1898.
A. It was kept in good condition.
Q. Just describe to the jury that particular piece of roadway so they will know just about the condition it was kept in.
A. Well, the roadbed is composed largely of rock that is of good width and the forces are kept on during the summer and early fall months so as to put it in a high state of efficiency so it will be in good shape to go through the winter.
Q. What time of year is the roadway in the best condition, if there is any best time, of the year?

A. In the fall, in October and November, the latter part of October, we consider it as the highest state of efficiency.

646 Q. If a train running over that line of road should be two or three hours late at Hope, Idaho, and running towards Spokane, state to the jury how it would be run, whether by telegraphic orders or otherwise?

Mr. R. H. VOORHEES: I object. He can tell how this train was run. I don't see the materiality of how other trains were run.

Mr. THOMPSON: We will show that all of the trains were run that way.

The COURT: I will allow you to show it. Of course, it is not material unless it applies to this particular train.

(Plaintiffs allowed an exception.)

Q. State how was the system and how that train ran when they were two or three hours late, whether by telegraph or otherwise?

A. They were run by telegraphic train orders.

Q. What do you know, if anything, as to where the telegraph stations were located from Hope westerly?

A. The names of the stations, you mean?

Q. Yes, sir.

A. Hope first, Sandpoint second.

Q. Third?

A. The third was Cocolalla.

Q. Fourth?

A. Athol.

Q. Next?

A. Rathdrum.

Q. Next?

A. Spokane.

Q. Have you any recollection or knowledge of your own as to how late the train coming west from Hope was on the 13th day of November, 1898?

647 A. I only knew it was late.

Q. You did not know how much?

A. No, sir.

Q. Do you know what engineer was in charge of that locomotive that drew the train?

A. Yes, sir.

Q. Who was that?

A. D. H. Matheson.

Mr. THOMPSON: There is no charge in the complaint, I believe, that he was an incompetent man?

Mr. R. H. VOORHEES: No, sir.

Q. Mr. Gilbert, beside the time that you have been division superintendent, as you have stated, what other railroad experience have you had in your life?

A. I have had charge of shop construction on this road, some four

or five years of that. Prior to that I was in charge of maintenance work and bridge work on an eastern trunk line.

Q. How many years altogether have you been giving to the actual operation of the railway?

A. From twenty-eight to thirty years.

Q. When did the device known as the vestibule come into vogue or begin to appear upon the railways of the country, in the western railways of the United States?

A. In about 1892; I think 1892.

Q. Do you recall when the first vestibuled cars came upon the Northern Pacific?

A. Approximately.

Q. When was that, Mr. Gilbert?

A. About eight years ago.

Q. About 1892?

A. I think so.

Q. Which were the first trains vestibuled?

A. The overland trains.

648 Q. What part of the trains were vestibuled first?

A. The sleeping-cars.

Q. Why were not all of the cars vestibuled at the same time?

A. Because it was not practicable to vestibule them all at once.

Q. Give the reasons now, if there was any reason, why you could not procure the vestibuling.

A. First, there was a limited amount of equipment, and only certain cars could be taken out of service for this purpose, or as cars required repairs and overhauling they were put into the shops and vestibuling put on.

Q. What do you know if anything with reference to whether that vestibuling was a patent or not?

A. Yes, sir, it was a patent.

Q. What were the next cars after the first-class sleepers that were vestibuled?

A. Dining-cars.

Q. And what next after the dining-cars?

A. The first-class coaches.

Q. What are known as first-class day-coaches.

A. Yes, sir.

Q. And what next after the first-class day-coaches?

A. I think the tourist-cars came next.

Q. Were the tourist-cars or the smokers first begun on?

A. I think the smoking-cars received that class of equipment first and then the tourist-cars.

Q. What is the fact as to whether the tourist-cars were or

649 were not the last of all of the cars occupied by passengers to be vestibuled?

A. They were the last.

Q. What do you know as to whether any of the tourist-sleepers were vestibuled in the year 1898?

A. There were very few, if any.

Q. Were there any run over your road that were vestibuled in 1898?

A. Not that I know of.

Q. How long had the tourist-sleepers been run over your road?

A. I think from 1888, probably about that time, about twelve years ago.

Q. And during all of that twelve years, up to and during the year 1898, you don't know that you ever saw a vestibuled car of that kind?

A. No, sir, I don't recollect; there may have been.

Q. What knowledge have you as to whether or not those cars were run upon the railways of the United States generally?

A. They were.

Q. What do you know as to whether or not they were vestibuled or otherwise?

A. My knowledge is limited to my travels; I don't know of those lines I passed over being vestibuled.

Q. What lines did you pass over, generally?

A. The Southern Pacific——

Mr. R. H. VOORHEES: We object and move to strike out the last answer and this present one, on the ground it is utterly immaterial whether other roads have put the vestibule appliance on this particular kind of a car or not; in other words, whether other roads have been guilty of the negligence we charge against this
650 road or not is utterly immaterial in showing that there is an absence of negligence on the part of this road.

(Objection overruled and motion denied. Plaintiffs allowed an exception.)

A. The Southern Pacific, the Burlington, Northwestern.

Q. What other?

A. Michigan Central and New York Central & Hudson River, Erie.

Q. Any others that you can name?

A. No, I don't recollect any others.

Q. Now, can you tell the jury the reason, Mr. Gilbert, why the tourist-sleepers were the last of those selected by the railways generally for vestibuling?

A. Yes, sir; they were a special car, built for a certain and specific use and for the use invariably of through passengers; that is the only reason that I know.

Mr. R. H. VOORHEES: For what kind of passengers?

A. Generally through passengers.

Q. What do you know, if anything, about those cars being limited in number or otherwise?

A. There was a limited amount of equipment; as to the exact number I could not testify.

Q. In the vestibuling of a car, I wish you would describe to the jury in railroading what was the principal object to be attained in vestibuling and what was the necessity that called it about; why was it put in operation; what purpose was it to subserve?

A. First, to protect passengers from the elements, from the weather, passing from one car to another.

651 Q. How would that protect the passengers from the elements? Just describe.

A. Shut out the weather, storm, rain, or snow.

Q. Before the vestibuling, what protection did a passenger have in passing over the platforms from one car to another, from storm or rain?

A. Only the hood of the coach, the extension over the platform.

Q. Did those hoods come together, or was there a space between them?

A. No, there was a space between them.

Q. What protection was there for a passenger in passing from one car to another on trains?

A. None.

Q. What effect did the vestibuling have as to shutting out the snow and rain and sleet and wind?

A. It shut them out.

Q. What do you know as to the action of the Northern Pacific railroad in proceeding to obtain this vestibule device as rapidly as possible, or whether the contrary prevailed?

Mr. C. S. VOORHEES: We object. It calls for a conclusion. He may state what was done. The witness' opinion as to whether it was as rapid as possible or otherwise is not proper.

Mr. THOMPSON: Yes, that is what I asked him to do, what he did, what the company did in that direction.

Mr. C. S. VOORHEES: I object to the question in the form in which it is put.

(Overruled. Plaintiffs allowed an exception.)

652 A. The cars were vestibuled as rapidly as practicable.

Q. State what the fact is as to whether that has continued up to the present time or whether it has been stopped?

A. No, it has continued.

Q. Have they succeeded yet in getting them all vestibuled?

Mr. C. S. VOORHEES: I object to anything that transpired after the 13th of November, 1898.

Mr. THOMPSON: For the purpose of showing that they have not been able yet with all diligence to accomplish it up to this time, two years after.

Mr. C. S. VOORHEES: I object to anything that has happened since the 13th of November, 1898.

(Objection sustained.)

Q. Were you acquainted with Mr. Jay H. Adams of this city in his lifetime?

A. Yes, sir.

Q. What sort of a looking man was Mr. Adams?

A. A short, thick-set man, smooth face, ruddy complexion, rather heavy man.

Q. What was about his weight, if you know?

A. I can only estimate it. I should judge he weighed about two hundred, possibly a little more, maybe two hundred and twenty-five; he was more than the average.

Q. What was he as to being a short man or tall man?

A. He was a short man, thick-set.

Q. What was there, if anything, about his complexion to attract attention?

A. Ruddy complexion.

Q. How long had you known him?

653 A. I think I had known Mr. Adams for two years, possibly.

Q. What do you know, if anything, about his habit of traveling upon the Northern Pacific railway line?

A. I have met him on our trains.

Q. How often?

A. Several times, I don't recollect how often.

Q. Traveling in which direction?

A. Both ways; I have met him on both sides of Spokane.

Q. I will ask you to state to the jury what the fact is as to whether each of the passenger trains on the Northern Pacific going east and west over the line during the year 1898 carried one or more tourist-sleepers?

A. They did carry one or more.

Cross-examination.

(By Mr. R. H. YOORHEES:)

Q. Mr. Gilbert, you say that it was not practicable all at once to vestibule the Northern Pacific cars throughout because of the equipment: explain what you mean by that.

A. Shall I explain it at length?

Q. I would like to know. Let me ask it this way. Do you mean by that that it was not convenient to lay the cars off to be vestibuled?

A. Well, not that so much as it was a matter of shop facilities, probably, to take care of them all at once.

654 Q. You say "probably," do you know that that is so?

A. In a general way, yes, sir.

Q. You think that is so?

A. Yes, sir.

Q. Now, just to simplify what I mean, Mr. Gilbert, I will ask you if on your examination in the last trial these replies were not given to the questions I read: "You could have purchased new cars with vestibule appliances? A. I presume most likely. Q. The road had sufficient capital, I suppose? A. I am not posted on that. Q. Then the reason why they did not was that with the amount of cars they had it just was not convenient to lay them out of the service long enough to get them vestibuled? A. I suppose so; yes, sir." Is that correct as to what you stated before?

A. Yes, sir, that is my recollection of the testimony.

Q. That is still correct?

A. Yes, sir.

Q. Now, Mr. Gilbert, if the convenience of keeping cars in service

had not prevented the vestibuling, do you mean to say that it was not possible to have vestibuling done prior to 1898?

A. I suppose it was possible, yes.

Q. It could have been accomplished?

A. I presume it could.

Q. Except for the inconvenience of laying out the cars from service from time to time?

A. Yes, sir.

Q. Mr. Thompson has asked you if there was not a patent on this device?

A. Yes, sir.

Q. You answered there was?

A. Yes, sir.

655 Q. I will ask you, Mr. Gilbert, if the fact that there was a patent on this device prevented the sale of it by those who had it for sale or prevented you from buying it for the Northern Pacific?

A. Not that I am aware of.

Q. You know of no way in the world in which the fact that there was a patent on this device prevented the Northern Pacific from using it?

A. No, I could not say.

Q. The fact is, that when a man has a patent on a thing that he likes to sell it, don't he; it is customary?

A. I believe so.

Q. Now, Mr. Gilbert, you say that the reason why the tourist-car was not vestibuled until the last was that it was for through passengers?

A. Yes, sir.

Q. That is to say, passengers who were expected to stay in the car?

A. Yes, sir, that is people not getting on and off constantly.

Q. Or passing the platforms?

A. Yes, sir.

Q. Hence, the absence of the vestibule. Those not passing the platforms, the vestibule was thought less necessary on that car than other cars?

A. I presume likely.

Q. When were the tourist-cars now in service, Mr. Gilbert, purchased or put in operation by the Northern Pacific?

A. I can't swear as to the exact time of the year. They have been in use, as I have testified, since 1888, I believe, about twelve years.

Q. About twelve years?

656 A. About twelve years, I think; that is my recollection.

Q. I don't mean how long have tourist-cars been in service, but how long the cars which were in service on November 13th, 1898, had been owned by the company?

A. That I could not say exactly. My recollection is that the cars had been in service for about twelve years.

Q. Those then had?

A. I could not say as to that, whether those particular cars had or had not.

Q. During that twelve years they had been laid off for repairs and painting from time to time?

A. I presume likely.

Q. Probably all of them in twelve years' use had been laid off?

A. Possibly.

Q. Several times, had they not?

A. Possibly.

Q. Sent to the shops for repairs?

A. Yes, sir.

Q. And were they out of service during that time while they were being repaired and painted?

A. Oh, yes.

Q. No reason why they could not have been vestibuled at that time that you know of, is there, without even inconveniencing the road by taking them out of service?

A. Twelve years ago?

Q. No, during the twelve years that I speak of.

A. No; I stated they could not vestibule them all.

Q. When they were in the shops then, they had shop facilities to repair and paint them?

A. Possibly they might not have had the vestibules on hand.

657 Q. Might not, but you don't know they did not?

A. No, I could not say.

Q. So the inconvenience of drawing them out of service, since they were from time to time out of service and in the shops would not have prevented them from being vestibuled at those times, would it?

A. Not that particular thing, no, sir.

Q. Now, Mr. Gilbert, Mr. Thompson asked you as to the function of this particular apparatus that enclosed the platform, makes a continuous passage from car to car with considerable particularity, but he omitted to ask if it did not prevent the passenger from falling or being thrown off while the train was in motion. He asked you about the wind and the weather and snow and so on. Is it not a fact that it has that function?

A. Yes, sir.

Q. And thereby adds materially to the safety of the passenger as he crosses from car to car, does it not, Mr. Gilbert?

A. Yes, sir, it adds to the safety.

Redirect examination:

Q. One question I forgot to ask. Mr. Gilbert, there are some curves in the Northern Pacific railway track after you leave Pack River trestle coming west for two or three miles there, marked six degrees on the map. I will ask you where you have a six degree curve on your road what the fact is as to whether one or the other of the rails is raised and if so, which rail?

A. The outer rail is raised.

658 Q. When you speak of the outer rail you mean on the convex side of the curve?

A. Yes, sir.

Q. On a six degree curve how much in actual practice is that rail raised?

A. Six inches.

Q. What is the object of raising it, and what good purpose does it subserve?

A. It is to balance the overturning tendency, balance centrifugal force, as we term it.

Q. As the train is going forward the tendency is to continue in a straight line.

A. Yes, sir.

Q. And when you are going to deviate from that line the bearing would be against the outer rail?

A. Yes, sir.

Q. What is the fact as to whether all degrees of curvature are raised the same; for instance, a two degree curve and a six-degree curve, or whether they are raised in different elevations?

A. They are raised in different elevations.

Q. And which the greatest?

A. The greater curve.

Q. I will ask you to state whether a six degree curve is always raised six inches or whether it is modified in accordance with other conditions?

A. It is modified.

Q. Now, just state to the jury how much it is necessary to raise some six degree curve six inches and some only about five or five and a half.

A. Some of these curves are on grades and if they were ele-
659 vated the entire line six inches it would offer too much resistance to a slow moving train like freight trains.

Q. Would those freight trains going on that up-grade be necessarily compelled to go slowly?

A. They would.

Q. What then is taken into consideration in fixing the elevation, whether certain trains or all trains and a compromse reached, or whether some particular train determines the amount?

A. It is a compromise in a single track.

Q. Do you know what the actual elevation of the outer rail of the curve, six degree curve, at the point where it is supposed Mr. Adams' body was found is?

A. Yes, sir.

Q. What is it?

A. What is it or what was it?

Q. Yes; what was it at that time?

A. Five and three quarters inches.

Q. About a quarter of an inch less than the technical elevation?

A. Yes, sir.

Q. Who did own, for instance, in 1898, the different tourist-cars, tourist sleepers, that passed over the Northern Pacific line?

A. That I don't know. I presume—I can't answer that question.
Q. I was trying to get at whether they all belonged to the same company or different companies.
A. That I don't know. I don't know as to the ownership.
660 Q. Did they belong to the Northern Pacific road or any other road?
A. There were other roads, I presume, running sleeping cars.
Q. That is what I was trying to get at, whether your road hauled your own or hauled those of other lines that were sent to you?
A. We had those of other lines, of course.

Mr. R. H. VOORHEES: I move to strike that out, unless it is to be followed up by showing that this particular car was run by another road or owned by another road and was switched on to this road, on the ground it is entirely immaterial, otherwise that other roads were sending cars over that line or not.
The WITNESS: All other roads were sending cars over ours.
Mr. THOMPSON: I am going to follow it up.
(Motion denied. Plaintiffs allowed an exception.)

Q. I will ask you to state at that time what the fact is as to whether any of these cars, either furnished by your own road or sent over by other roads were vestibuled at that time?
A. So far as I know they were not.

Recross examination:

Q. You don't know that those sent over by the other roads were not?
A. I could not say positively.
Q. Mr. Gilbert, the raising of that rail, the raising of the
661 outer rail on a curve, there are several factors which indicate how high that rail is to be raised, are there not?
A. Yes.
Q. Namely, the degree of curve and the speed?
A. Yes, sir.
Q. Speed enters into it, does it not?
A. Yes, sir.
Q. The idea is to overcome the tendency of the train to lean out by centrifugal force, or at least continue in a straight line by raising the rail and pulling the train on the concavity of the curve. That is the idea?
A. Yes, sir.
Q. Now, the greater the speed with which you go around the curve, the greater the tendency to continue in a straight line, is it not, Mr. Gilbert?
A. Yes, sir.
Q. And the greater the speed, therefore, the greater the raise necessary of the outer rail in order to overcome the tendency to go in a straight line and not continue around the curve?
A. Yes, sir.
Q. So that a raise which would compensate for the tendency to

continue in a straight line, instead of going around the curve going at thirty miles an hour would not exactly compensate at forty?

A. Not quite; no.

Q. Or at fifty?

A. No.

Q. Still less. Now, what was the rate of speed that five and three-fourths inches raise of the rail is graduated by?

A. You mean as to speed?

Q. Yes, sir.

A. About forty miles an hour.

662 Q. Now, I will ask you, Mr. Gilbert, whether in practical operation the effect of that raised rail is such as to make the train take the curve and prevent the flange hitting the inner side of the outer rail, the flange of the wheel, and so to prevent jar and motion, lateral motion, when the train goes around the curve, practically speaking?

A. Well, no, if you will allow me to explain it.

Q. Yes, sir.

A. Theoretically the proper elevation would prevent the wheels from striking against the outer rail; practically it would not.

Q. Practically that don't happen?

A. No; that don't happen.

Q. We are just practical men and we don't hit perfection even in railroading.

A. Not quite.

Q. So, that when all is said and done, is it not a fact that the flange of the wheel is the thing that keeps the train on the track, and that the flange will hit the rail in going around the curve?

A. Yes, sir.

Q. Practically speaking, among practical men?

A. Yes, sir.

Re-redirect examination:

Q. That is simply because it is absolutely impossible to make rolling stock absolutely perfect and a track absolutely perfect, is it not?

A. Yes, sir.

Q. But for all ordinary purposes of railroading it subserves its purpose excellently, does it not?

A. Yes, sir.

663 Re-recross-examination:

Q. That raised rail, Mr. Gilbert, five and three-fourths inches, a train could go around that at fifty or sixty miles an hour, and with each additional mile of speed the striking of the flange against the rail would be harder, would it not?

A. Yes, sir.

Q. The raise would be sufficient to permit a train going around a six degree curve at fifty or sixty miles an hour without trouble?

A. Yes, sir.

(Excused.)

W. E. DIKEMAN, testified:

Direct examination.

(By Mr. THOMPSON:)

Q. Mr. Dikeman, what is your occupation?
A. My occupation is conductor—freight conductor of the N. P.
Q. How long have you been serving as freight conductor on trains of that road?
A. About six years here.
Q. Where were you on the 13th day of November, 1898?
A. I arrived in Hope the evening of the 13th.
Q. With your freight train?
A. Yes, sir.
Q. What time in the evening?
A. Well, I don't have that in mind; we was due in there at, I think, at about four o'clock in the evening.
664 Q. Well, in order to make as much time as possible—when and where did you first get any information of the loss of a man from a train, or the death of Mr. Adams?
A. That was the morning of the 14th.
Q. Where?
A. At Hope.
Q. What was the first information that you received, and what did you do?
A. I was due to leave there at, I believe it was 7 or 7:15 in the morning, a. m., as I was getting my train made up to come out of there I received instructions from Mr. Gilbert to look out for a man that was supposed to have—was lost, or was supposed to have fallen off of number one.
Q. Number one was the passenger train that had passed there the evening before?
A. Yes, sir.
Q. What did you do; what steps did you take?
A. I received the message; and I turned the message over to my men; I let them read it; and we pulled out of Hope at 7:15, I believe it was.
Q. What instructions did you give to watch out?
A. I told them to watch out; I gave them the message, and gave them instructions to watch out from the train.
Q. Where were you bound; from Hope to Spokane?
A. Yes, sir.
Q. Was that a slow train or was that a rapid train?
A. A slow train; it was a local train.
Q. What was the first, if anything, discovered?
A. Well, my head brakeman first saw the man. He watched along—my head brakeman first saw the man; he was on the
665 engine; he first saw the man; and we was running, and of course we ran by it before we could get stopped.
Q. Well, what is the fact as to whether you actually did stop?
A. Yes, we finally stopped.

Q. What did you find?

A. We stopped and backed up to where he saw the man, and found him.

Q. Where was the man lying?

A. He was lying off the track.

Q. On which side of the track, as you come towards Spokane?

A. On that side, towards the lake.

Q. On the left-hand side, towards the lake?

A. Yes, sir.

Q. How far was he from the side of the track?

A. Well, it was down off—I did not measure it, I should judge thirty-five feet, or such a matter.

Q. About thirty-five feet?

A. Yes, sir.

Q. What was the character of the embankment there, as to being steep or otherwise?

A. Well, it was built up of riprap—rock riprap.

Q. How high was the roadbed and track above the spot where Mr. Adams lay, or the body lay, which you saw?

A. Well, I did not measure that.

Q. Give your best judgment.

A. I should judge it was thirty-five feet from the track; maybe down thirty-five feet off.

Q. Twenty-five feet?

A. Yes, or thirty-five feet down, it went down gradually that way (indicating.)

666 Q. Speak a little louder.

A. It went gradually down; it was riprap.

Q. If it was thirty-five feet out from the track, how far was it below the level of the track, if a straight line had been stretched out from the track, over the body?

A. I cannot say as to that.

Q. You did not pay any attention to that?

A. No, sir.

Q. What was the character of the ground there, as to being rocky or otherwise?

A. It was all rocky.

Q. What did you do then?

A. We got stopped and backed up; and we went down, my brakemen and myself both, all went down to it and looked at him.

Q. What condition was the body in? State what you noticed.

A. Well, he laid there on one side, on his arm a little bit, I believe, on his right side, I believe.

Q. Did you notice any movements?

A. Not a thing; no, sir.

Q. What is that?

A. No, I did not notice any movements.

Q. What kind of a body was it—whether the body of a slender lean man or of a short thick-set man?

A. A short man, it was heavy; I should judge would weigh two hundred pounds; he was thick-set; very heavy.

Q. What did you do with the body, if anything?
A. I done nothing with the body; we looked it over, and it was perfectly still, we did not touch the body in any way, shape
667 or manner, we just looked the body over, my brakemen and myself. And we had not passed the section men yet. And I said, "We won't touch the body at all, but we will go on and see the section men and tell them to take charge of it until we get to the telegraph station."

Mr. C. S. VOORHEES: I object to what he told his brakemen.

Q. Do not state what you said; state what you did.
A. We looked the body over; and I went on until I found the section men.
Q. How far did you have to go to find the section men?
A. I should judge a half a mile or a mile perhaps; I don't know exactly.
Q. What did you do when you found the section men?
A. I stopped and notified the section foreman what I found, and to go back there and take charge of the body until I could get to a telegraph office and wire Mr. Gilbert.
Q. You may state what the section foreman did as to starting to obey your orders.
A. He said he would do that; and he did it.
Q. What was that section foreman's name?
A. Connors.
Q. Mr. Connors?
A. Yes, sir.
Q. What did you do then as to going on?
A. We went on then to Sandpoint.
Q. What did you do over there?
A. I wired Mr. Gilbert.
Q. Who is Mr. Gilbert?
668 A. Superintendent of the Northern Pacific.
Q. Superintendent of this division?
A. Yes, sir.
Q. At Spokane?
A. Yes, sir.
Q. What did you do with your train then?
A. Mr. Gilbert gave me instructions to set my train out at Sandpoint, take my caboose and meet No. 2 there.
Q. What do you mean by No. 2?
A. Well, the passenger train that was going east.
Q. Going east?
A. Yes, sir.
Q. Then to take your caboose and do what?
A. To meet Mr. Allen and party, and take Mr. Allen and party back to the body.
Q. That was Mr. Albert Allen, a lawyer of Spokane?
A. I don't know his initials; yes, sir.
Q. State what you did as to obeying those orders.
A. I obeyed them.

Q. What did you do as to meeting Mr. Allen?

A. I met Mr. Allen at Sandpoint, where he got off the passenger train.

Q. Were there any persons with Mr. Allen?

A. Yes, sir; there were two men with them.

Q. What did you do with those gentlemen?

A. I told Mr. Allen my instructions. And I went to work under his instructions then. I took him and his party off—and I believe they picked up two or three men at Sandpoint, gentlemen that they knew there.

Q. How much of a train did you take out; engine and caboose?

A. That is all.

Q. Where did you go?

669 A. Went back to the body.

Q. Who did you find in charge of the body?

A. The section men.

Q. Mr. Connors and his men?

A. Yes, sir.

Q. What is the fact as to whether you found the body had been moved or not or whether it was in the same place?

A. Apparently laid just the same as I saw it before.

Q. What did you do when you got there, you and Mr. Allen and the balance of you?

A. I left it to Mr. Allen; he took charge of the body.

Q. Well, what did you do with the body?

A. Well, we took the body—took the body up and put it in the caboose and took it to Hope.

Q. Did you assist in making any measurements, or anything of that kind, there?

A. No measurements; no, I did not.

Q. What did you take besides the body, if anything; did you find his hat?

A. Yes, sir; took everything that was there.

Q. Were you present when the hat was found?

A. Yes, sir.

Q. Where was that found?

A. That was off a little diagonally from him.

Q. Towards Spokane or Hope?

A. Towards Hope.

Q. What is the fact as to whether the hat was nearer to the track, or farther, than the body?

A. Nearer to the track.

670 Q. What did you do with the body after you took it to Hope?

A. We went to Hope with the body and took in the depot at Hope. I believe that Mr. Allen tried to get the coroner there to hold an inquest, and found that he would have to get the coroner from Cœur d'Alene city. And after a while they decided it would be so long to get a coroner clear from Cœur d'Alene city there, that they had better go to Rathdrum and hold the inquest. We reloaded the body in the caboose; and Mr. Allen decided that that was the best and came to Rathdrum and held the inquest.

Q. Well, was there an inquest held there?
A. At Rathdrum.
Q. Did you remain during the inquest?
A. Yes, sir.
Q. What did you do after the inquest?
A. Brought the body to Spokane.
Q. And when the body got to Spokane what did you do with it?
A. I delivered it at the depot.
Q. Did you have anything else to do after that with the body in any way?
A. No, sir.
Q. Or anything else to do with ascertaining where it was located or anything?
A. No, sir.
Q. That is the last of your service in connection with it?
A. When I delivered it at the depot, that was the last.

671 Cross-examination.

(By Mr. R. H. VOORHEES:)

Q. Mr. Dikeman, was there snow on the ground that morning?
A. No, sir, I think not.
Q. You say that the body lay thirty-five feet off. Off from what?
A. I say that I judged that; I did not measure it.
Q. You made *made* no measurement at all?
A. No, sir.
Q. Are you now repeating the conclusion you reached at that time, or a conclusion formed since?
A. I am repeating the same conclusion that I have had all the time.
Q. Did you reach that conclusion at that time?
A. Yes, that was my idea.
Q. You guessed it off about thirty-five feet?
A. Well, I should judge that, straight.
Q. From what point?
A. Straight from the track.
Q. From the track?
A. Yes, sir.
Q. Wasn't there a bench there at the bottom of the riprap, Mr. Dikeman, a low bench?
A. Well, it was riprapped right off like that, down like that (indicating), I don't know whether you call it a bench or what you call it; it is riprapped, what we call riprapped; it is rock put in to support the track.
Q. Now, isn't it a fact, Mr. Dikeman, or do you remember that—or prior to that—how steep is that embankment or riprap?
A. I couldn't say with regard to that.
672 Q. You saw it at the same time, didn't you?
A. I saw it; I helped to bring the body up.

Q. You don't remember anything about it. Do I understand you to say you don't remember?

A. I couldn't say how steep it was; no, sir.

Q. It might be a pitch like that, or it might be a pitch like that (indicating)?

A. It went diagonally down that way (indicating), how low I couldn't say.

Q. You don't remember anything about any bench at the bottom of that riprap; you think there was just a level from the bottom of the riprap right along out, that is substantially?

A. From the track—it was steeper there than it was out further, of course.

Q. Yes; and you think the slant was about something like that (indicating)?

A. Yes, sir; about that.

Q. How from the bottom of that riprap was the body?

A. It was all really riprap there.

Q. Was there not an embankment?

A. No, I didn't see any embankment more than the riprap like.

(Mr. BUNN:)

Q. Speak a little louder.

A. Why, it was slanting down; it was riprap; what we call riprap. It was rock to support the track.

(Mr. R. H. VOORHEES:)

Q. And went slanting right along down to the beach of the lake?

A. It did not go clear to the beach, no, but it went down to where the body was. The body lay on the rock.

673 Q. Did the body lay at the bottom of that embankment?

A. I don't know whether it was the extreme bottom or not.

Q. How far from the bottom did it lie?

A. I could not say.

Q. I say how far from the bottom did it lie?

A. I cannot say with regard to that.

Q. You don't know?

A. No.

Q. Do you know how it is that you remember so distinctly that it lay exactly thirty-five feet from the track?

A. I cannot say that; I say I judged that.

Q. And cannot remember how far it lay from the bottom of the embankment?

A. The lake bottom was two hundred or three hundred feet from there, or one hundred feet from there.

Q. I am not asking you about the lake bottom. I am asking you about the bottom of the embankment.

A. I cannot say.

Q. You don't remember?

A. No.

Q. You don't know anything about that. You don't have any

remembrance of the fact that at the bottom of the riprap there was a bench extending out, do you?

A. Nothing more than a foot or two, maybe, from the side of the track.

Q. From the side of the track?

A. They generally have a little bench about the track, that is all.

Q. Then you think there was a bench extending out from the track, do you?

674 A. There always is; the ties have to lay on something; a little, I said; it was slanting down that way.

Q. Yes; like that (indicating)?

A. Yes, sir.

Q. How was the riprap made?

A. Out of rock.

Q. How was it set onto the embankment, just rough rock thrown there?

A. Yes, small rocks.

Q. Small rocks thrown on the embankment?

A. Yes, sir.

Q. That was what the embankment was made of, just small rocks?

A. Yes, sir.

Q. That ran down from the track?

A. Yes, sir.

Q. Then was that about the same kind of rocks that there was elsewhere on the beach there?

A. Well, about the same rocks as—they may be smaller or larger than that riprap; that was riprapping to support the track.

Q. But practically the same?

A. Yes, sir; there are pieces of rock.

Q. If there had been a raised bench extending from the bottom of the riprap out several feet, you would have noticed, that wouldn't you?

A. From the bottom of the riprap?

Q. Yes, down at the base of the riprap.

A. I didn't see that.

Q. You didn't see any bench there, did you?

A. What, down below?

Q. Yes, sir.

A. No, sir.

Q. You are pretty sure there wasn't any?

675 A. I didn't see any.

Q. You are just as sure about that as about the thirty-five feet?

A. I didn't say I was sure of that; I didn't measure it. My judgment was that it was about thirty-five feet.

Q. Now, you say, Mr. Dikeman, that Mr. Connors was there with you, and his train crew?

A. Mr. Connors, the section foreman.

Q. Mr. Connors, the section foreman. He was there when you took the body up, helped you put it onto the train?

A. I don't know whether—about Mr. Connor being there, but his men were there. I had sent him there.

Q. Didn't you say in your direct examination that Mr. Connors was there?

A. I said that I reported to Mr. Connors about a mile west of there, and sent him with his section men, or told him in regard to the circumstances, and he went back to take charge of the body until I got back there. That is what I said.

Q. You said also, did you not, that Mr. Connors was there when you were?

A. I wouldn't swear whether he was there or not; his men were there if he was not, when we came back.

Q. Then you mean to say that you don't know whether he was there or not?

A. I know he went there.

Q. At the time the body was moved?

A. No, at the time that I found the body.

Q. He was there at the time that you found the body?

676 A. No, sir; he went there; I reported to him.

Q. Didn't you come back?

A. No, sir, not until I got to Sandpoint.

Q. Did you help take the body up?

A. Yes, sir.

Q. After you had reported to Mr. Connors, did you come back then?

A. Yes, sir.

Q. And help take the body up?

A. Not until I got to Sandpoint.

Q. Well, then, did you go back?

A. Yes, sir.

Q. And the body was still lying on the ground?

A. Yes, sir.

Q. When you got there. In the same place?

A. Yes, sir.

Q. Was Mr. Connors there then?

A. I wouldn't swear whether Mr. Connors was there or not; his men was there.

Q. And if you said before that Mr. Connors was there when you took the body up, you want to be understood now as saying you don't know whether he was there or not?

A. I sent Mr. Connors there.

Q. Just answer my question, Mr. Dikeman. If you testified before that Mr. Connors was there when you took the body up, you wish now as being understood as saying you don't know whether he was there or not?

A. Him or his men was; just the same.

Q. Well, do you know whether he was or not?

A. No, I don't.

Q. No, you don't. But you do know about the thirty-five feet. You wouldn't swear whether Mr. Connors was there, but your

677 memory is good as to the thirty-five feet? Do you know how far the edge of that riprap is from the track?

A. No, sir.
Q. The top edge?
A. No, sir.
Q. What did you see on the ground about there, besides the body and the hat, anything?
A. I believe there was a cuff. There was a cuff laying on the riprap.
Q. And blood spots?
A. Yes, I saw blood spots.
Q. Where were they?
A. They were off—well, there were blood spots right where he laid, and then right diagonally towards the track?
Q. How far were they from the body—the blood spots?
A. Well, there were blood spots right under his head, almost.
Q. And where else, and how far from the body?
A. Well it was off diagonally.
Q. How far?
A. I don't know—well, I don't know, I didn't measure the distance.
Q. You have no recollection of that?
A. No; I should think fifteen feet or such a matter.
Q. How much?
A. Fifteen feet maybe.
Q. Who else was there; name those who were there when you picked up the body, Mr. Dikeman.
A. Well, it was Mr. Allen and the two parties that he had with him, and the three that he took from Sandpoint; I don't know
678 their names; I think that it was the two gentlemen that you had on the stand here.
Q. What other railroad men?
A. Well, my brakeman.
Q. Is that all?
A. My brakeman was there, both of them, two of them, Mr. Morris and Mr. Thompson; and the section foreman, whoever it was.

Mr. THOMPSON: Turn around to the jury, Mr. Dikeman.

A. My two brakemen was there, and the section men, whoever they were.
Q. Is that all?
A. All the railroad men?
Q. Yes.
A. Yes, sir.
Q. Then you have reached the conclusion that Mr. Connors was not there?
A. I would not swear whether Mr. Connors was there or whether he was not. I sent him there, and his men was there.

(Excused.)

W. E. DIKEMAN, recalled, testified:

Direct examination.

(By Mr. THOMPSON:)

Q. Did you notice the bush that was near the body where it was lying?

A. Yes, sir.

Q. What was that a large or a small bush or what kind of a bush?

A. It was a small bush.

679 Q. How was the body lying with reference to the bush?

A. It was lying—I believe his arm and head kind of laid on the bush.

Q. How was the feet as to lying over any bush or being upward about any bush?

A. I did not notice that his feet was on any bush; I believe that his head or arm was on a kind of a bush, small bush.

Q. How was the body lying as to the direction of the head and the direction of the feet? Which direction was the head?

A. The head was toward Hope and feet toward Spokane; that is, it might not have been in an exact line.

Q. But that was the general direction?

A. Yes, sir.

Cross-examination.

(By Mr. R. H. VOORHEES:)

Q. How did the body face—how did it lie?

A. It lay, as I understand it, on his right side.

Q. On his right side?

A. Yes, sir.

Q. And facing that would make him face the track?

A. Yes; that would make him face toward the track, which was on a curve, you know.

(By the COURT:)

Q. Mr. Dikeman, what was the condition of the clothing on the body?

680 A. I don't know as it was disturbed very much; of course the cuff was off; there was one cuff off quite a ways and the hat was off quite a ways from the body, and his clothing, I don't think that was disturbed very much.

Q. Did you notice whether the coat or any part of the clothing was torn or ripped?

A. Not off, no, sir.

Q. You did not see anything?

A. No, sir.

Q. He had his coat on?

A. Yes, sir.

(Excused.)

HARRY H. MORRIS testified as follows:

Direct examination.

(By Mr. THOMPSON:)

Q. Mr. Morris, what is your occupation?
A. Conductor on the Northern Pacific.
Q. How long have you been conductor?
A. Three months.
Q. What was your occupation before becoming conductor?
A. Brakeman.
Q. On what road and what class of trains?
A. Northern Pacific; freight trains.
Q. How long had you been in that business before you were appointed conductor?
A. Three years.
Q. Where were you serving on the 13th and 14th days of November, 1898?
A. On the Northern Pacific on the east end, first district.
Q. Do you recollect the circumstances of a body being found out near Hope, Idaho, about that time?
A. Yes, sir.

681 Q. State what was the first knowledge you had with reference to it, what occurred, and what you did, as rapidly as you can, to the jury, and make it clear.

A. Before leaving Hope, Conductor Dikeman received a message from Spokane to keep a sharp lookout for bodies, a man supposed to have fallen off from No. 1, and we did so, and after passing over Pack River trestle, about a mile and a half west of there I was sitting on the engine on the left-hand side and saw the body and told the engineer to stop, and I dropped off.
Q. Did you drop off before the train stopped?
A. Yes, sir.
Q. What speed was the train going at when you passed the body?
A. Probably twenty miles an hour.
Q. Did you drop off at that speed?
A. No, sir.
Q. When the train slacked up? You went back to the body?
A. Yes, sir.
Q. Where was the body lying with reference to the railway track and with reference to the lake shore, which way from the railway track?
A. On the left-hand side.
Q. Left-hand side as it comes toward Spokane?
A. Yes, sir.
Q. And the lake shore was how far away from the railroad at that point?
A. I could not say as to that.
Q. What kind of a railway embankment or riprapping is there at that place, and how is the track situated with reference to Mr. Adams' body that you found there?

682 A. It is rocky, riprapping.

Q. At what elevation above Mr. Adams' body was the road-bed of the railroad?

A. Possibly fifteen feet.

Q. And what sort of a slope was there beyond the railroad track down to where the body was lying, whether an abrupt or a gradual slope?

A. Gradual slope part of the way.

Q. And what the balance of the way?

A. It was straight down.

Q. Straight down from where, at the railroad track?

A. No; there is a little sort of a bank like, and it is riprapped up and then it runs down after you get down to the bottom of that riprap.

Q. The railroad at that point is graded out of the side of the hill, is it not?

A. Yes, sir.

Q. Immediately from the railroad track ten or twelve feet, what was it, an abrupt slope or otherwise?

A. It is not that distance.

Q. About how much?

A. Probably six feet.

Q. What was that, a gradual or abrupt slope?

A. That was an abrupt slope.

Q. Was it faced with stone, earth or what?

A. Gravel, heavy gravel, rock, riprap, rock.

Q. Stone also? Then what was below that on the gradual slope from there down to where the body was?

A. The lake shore, the washed rocks, the bank of the lake.

Q. How far was the body that you found lying from the railroad track?

A. Between thirty and thirty-five feet.

683 Q. How much?

A. Between thirty and thirty-five feet.

Q. How was it lying with reference to being parallel with the track or with the head towards the track or the feet towards the track, or how?

A. The head was lying towards Spokane—towards Hope, and the feet towards Spokane.

Q. You think the feet were towards Spokane?

A. Yes, sir.

Q. That is your recollection of it. And what, if anything, was there, as to being any bushes or anything of that kind there?

A. There was a bush there.

Q. How was the body lying with reference to the bush, whether under the bush or along it, or how?

A. Right up close to the bush, one hand was thrown back over his head on the bush.

Q. And how were the feet as to being on any bush or anything?

A. The feet was on rocks.

Q. The feet was on rocks. Who was the first person to the body?
A. I was.
Q. How long after you reached the body before any one else came?
A. They were right behind me.
Q. Who came from the train besides yourself to look at the body?
A. Conductor Dikeman and Brakeman Thompson.
Q. Any one else?
A. That was all at that time.
Q. How long did you remain there at the bottom?
A. Possibly ten minutes.

Q. What was done, if anything, as to touching the body or
684 making any movement or straightening it around in any way?

A. No, sir; none at all.
Q. After the examination of the body what did you do as to finding any blood spots or any other thing indicating where the body had been at any other time?
A. Yes, sir; we found blood spots.
Q. Which way from the body?
A. East.
Q. Towards Hope or Spokane?
A. Towards Hope.
Q. How far from the body?
A. About fifteen feet.
Q. And what kind of a blood spot was that, small or large or what?
A. Medium size; probably the size of your fist.
Q. Was the blood simply a stain, or was it clotted blood or what?
A. It was just a clot of blood, spattered a little.
Q. What other blood spots or marks did you find?
A. Found some blood right under the man's head.
Q. At any other distance from that or the body?
A. It spattered a little bit after he struck the first time, spattered over the rocks a little bit.
Q. "First time?"
A. Yes, sir.
Q. What do you mean by that?
A. The first clot of blood spattered a little bit.
Q. How far was the first spot of blood from the railway track?
A. Twenty feet, somewhere around there.
Q. What else did you find?
A. Found a hat.

685 Q. Where was the hat lying with reference to the track?
A. Lying along southeast of the body.

Q. How far away from the body?
A. Possibly twenty feet—from the body?
Q. Yes.
A. Probably fifteen or twenty feet, somewhere along there.
Q. Fifteen or twenty feet from the body?
A. Yes, sir.

Q. And how far from the railroad track?
A. Not over twenty feet, I don't think.
Q. What was done with the hat at that time, do you know?
A. Yes, sir.
Q. What was done with it?
A. What was done with the hat?
Q. Yes, sir.
A. Nothing at all.
Q. In other words, was anything done toward moving any of the property or the body or anything at that time?
A. No, sir.
Q. What did you do as to going after any other assistance?
A. We went to Sandpoint then; that is on the road down; and we met the section men and stopped there.
Q. How far did you travel before meeting the section men?
A. Probably three-quarters of a mile and stopped.
Q. What did you do as to stopping and having any directions given to them?
A. Stopped; I dropped off of the engine again and told the section men where the body was.
686 Q. What do you know, if anything, as to whether the section men started in the direction of the body?
A. Yes, sir.
Q. How many of them?
A. I think there were four of them all told.
Q. Who was the section boss of that section?
A. Mr. Connors.
Q. Do you know whether he was with them or not?
A. Yes, sir.
Q. Where did you go then after meeting the section men?
A. Sandpoint.
Q. How long did you remain there?
A. Probably forty minutes.
Q. What did you do as to bringing any other party back to the scene?
A. When I set out our train there at Sandpoint and went back, brought back some other men.
Q. Do you remember who they were?
A. I don't know the gentlemen by name; I know them by sight.
Q. Was it some of those gentlemen that came from Spokane on the passenger train?
A. Yes, sir.
Q. When you took that party, where did you go with them?
A. Back to where we found the man.
Q. What did you do then or what did they do with reference to moving the body?
A. We moved the body, after examining everything carefully.
Q. Where did you take the body to?
A. Hope.
Q. How long did you remain at Hope?
687 A. About an hour and a half.

Q. Where did you take the body then?
A. To Rathdrum.
Q. How long did you remain at Rathdrum?
A. About the same length of time.
Q. Where did you take the body then?
A. To Spokane.
Q. Did you have anything further to do with it after that?
A. After arriving in Spokane?
Q. Yes, sir.
A. Not after we put it in the ambulance?
Q. You helped put it in the ambulance?
A. Yes, sir.
Q. That was the last you ever saw of the body?
A. Yes, sir.
Q. Were there any articles of personal property found while you were there, such as watches or rings or anything of that sort?
A. A pair of spectacles and a nickel.
Q. Anything else?
A. A cuff and hat.
Q. Anything else that you can think of?
A. That is all.
Q. You don't recollect the finding of the ring?
A. No, sir.

Cross-examination.

(By Mr. REESE H. VOORHEES:)

Q. Mr. Morris, how far from the railroad track, from the rail, is the edge of the riprapped embankment?
A. Possibly three feet, maybe four.
688 Q. Four feet?
A. Between three and four feet.
Q. Pretty near four feet, is it not?
A. Somewhere around there.
Q. How much of a slope there, embankment?
A. You mean at the end of the riprap?
Q. From the top of the riprap down to the bottom?
A. How much of a slope?
Q. Yes, sir.
A. It goes straight down something like that, possibly that slope (illustration).
Q. And how is that riprapping made on that embankment?
A. Made of rock.
Q. What kind of rock?
A. I don't know the kind of rock it is; it is just rock.
Q. Is it coarse or fine or gravel or broken?
A. Yes, sir; it is pretty coarse rock.
Q. You mean by that big, heavy, broken rock?
A. Yes, sir.
Q. Then it is not gravel?
A. No, sir.

Q. And how far is it to the bottom of that coarse rocky embankment?
A. Possibly six feet.
Q. Six feet? And what is at the bottom of that embankment?
A. That is the lake shore.
Q. Any bench there of any kind?
A. No, it is a slope.
Q. Just a gradual slope?
A. Yes, sir.
Q. What is the nature of the ground there?
A. Gravel, just round rock washed from the lake, washed rock.
689 Q. Where the body was lying, what was the nature of the ground?
A. Rock.
Q. What kind of rock, gravel?
A. Lake shore rock.
Q. What is lake shore rock?
A. Washed pebbles, round rock.
Q. That is gravel, is it not, coarse gravel?
A. Some would call it that.
Q. That would be what you would call it?
A. I would call it rock.
Q. Can you tell whether it was gravel or not?
A. No, sir.
Q. You know what gravel is, don't you?
A. Yes, sir.
Q. Was it gravel?
A. No, sir.
Q. It was not gravel? Large rocks like your fist?
A. Some of them.
Q. Any broken rock?
A. Not right there.
Q. Some sand?
A. Very little.
Q. Now, how far was that body lying below the railroad track?
A. Between thirty and thirty-five feet.
Q. Below the railroad track?
A. What do you mean by "below"?
Q. I mean below.
A. Down that way?
Q. Yes, sir.
A. Down about fifteen feet.
Q. Fifteen feet. And this blood you speak of, how many spots of blood did you find there, how many places where there was blood, did you find?
A. Found two big places, that is, two places.
690 Q. Two places?
A. Yes, sir.
Q. And I understood you at one of the places the blood had spattered a little?

A. Yes, sir.
Q. That is all the places you found?
A. That is all.
Q. You looked over the ground carefully?
A. Yes, sir.
Q. Did you go toward the lake any from where the body was?
A. Not any more than to get around the body.
Q. You say the body was lying with the head toward Hope and the feet toward Spokane?
A. Yes, sir.
Q. Sure of that?
A. Yes, sir.
Q. Positive?
A. Yes, sir.
Q. Just as sure of that as you are of these distances that you have spoken of?
A. How is that?
Q. You are just as certain of that as you are of these distances that you have mentioned?
A. Yes, sir.
Q. You made no measurement at that time?
A. No, sir.
Q. Just guessed it off?
A. Yes, sir.
Q. How was the body lying with reference to the railroad track, parallel or otherwise?
A. Yes, lying parallel, kind of doubled up a little bit.
Q. How doubled up?
A. Just drawn up a little bit; the legs were drawn up a little bit.
Q. You mean the knees toward the abdomen?
A. Yes, sir.
Q. How was it lying?
A. On its side.
691 Q. Which way did the face face?
A. It faced the lake.
Q. Back toward the track?
A. Yes, sir.
Q. Sure of that?
A. Yes, sir.
Q. Just as sure of that as you are of these distances?
A. Yes, sir.

(Excused.)

J. L. THOMPSON, testified:

Direct examination.

(By Mr. THOMPSON:)

Q. Your name is J. L. Thompson?
A. J. L. Thompson.
Q. What was your business, Mr. Thompson, on the 13th or 14th, and 15th days of November, 1898?
A. I was brakeman on the Northern Pacific road.
Q. On what train? Freight or passenger?
A. Freight.
Q. Who was conductor?
A. W. E. Dikeman.
Q. The same gentleman who testified here yesterday?
A. Yes, sir.
Q. What brakeman were you; front or rear or what?
A. Rear brakeman.
Q. Where were you on the 13th day of November, 1898, the day on which it was supposed that Mr. Adams met his death?
A. We were in Hope, or going towards Hope from here.
Q. What time did you reach Hope that day?
A. I don't recollect.
692 Q. Where did you first find out that someone had been missed from the train—passenger train?
A. At Hope.
Q. What did you do then with reference to making any search?
A. The conductor, Mr. Dikeman, received instructions to look diligently along the track.
Q. Who went with Mr. Dikeman?
A. Myself, Mr. Morris, engineer and fireman.
Q. How did you go, on train or engine, or what?
A. On the train.
Q. What part of the train were you on?
A. On the caboose.
Q. How far out did you get before anything was discovered?
A. About a mile and a half west of Pack river.
Q. What is the fact as to whether the train was stopped at a point out there?
A. Yes, sir; the train was stopped.
Q. That was the first thing that you yourself discovered with reference to there being any body there?
A. From indications from the brakeman, I looked down by the side of the track and saw a body.
Q. On which side of the track was it as you came towards Spokane?
A. Left-hand side.
Q. How far away from the track?
A. Well, I judged from—after I got down there and looked towards the track I judged it was thirty-five or forty feet to the first rail.

Q. How was the body lying, as to whether it was on the sand or on the rocks, or how?

A. On the rocks.

693 Q. How was it lying with reference to any bush, or shrubbery in that vicinity?

A. It was close to a bush.

Q. What, if anything—or what part of the body, if any, was lying upon the bush?

A. One hand, I believe—arm.

Q. How was the head lying, with reference to the bush?

A. Close to the bush—facing it.

Q. How were the feet lying as to being upon the bush or what?

A. They were lying on the rock.

Q. What is the fact as to whether the feet were at that time lying up over the body, whether they were or not?

A. No, sir.

Q. They were not up?

A. No.

Q. In which direction was the head lying with reference to the town of Hope or the town of Spokane?

A. Toward Hope.

Q. How were the feet lying, whether they were lying in the opposite direction, or whether they were bent around?

A. Well, they were somewhat bent or pulled up, up towards Spokane, westerly direction.

Q. What indication was there at the point where the body was lying, of any blood, or anything of that kind, to attract your attention?

A. There were two or three spots of blood.

Q. Where was that blood with reference to the body?

A. Toward the track, or diagonally toward the track.

Q. And how far away from the body was the first spot of blood that you found?

694 A. Possibly ten to fifteen feet.

Q. Did you find any other spot of blood than that first spot?

A. I think there was.

Q. In which direction was that from the body?

A. Toward the track—or diagonally towards the track.

Q. In the same general line that this other blood spot was?

A. Yes, sir.

Q. How far was this second blood spot from the body?

A. I don't believe I could tell exactly, because I didn't measure it.

Q. I just want you to give your best judgment, if you have any judgment on the question, as to how far?

A. Well, I should say fifteen feet; maybe, ten or fifteen feet, probably; I did not look at it very closely.

Q. Farther than the other spot?

A. Toward the track; I didn't look at it very closely.

Q. What I am trying to get at is this; you say the first blood spot that you found was from fifteen to twenty feet from the body?

A. No, I didn't say that; I said ten or fifteen feet, possibly.

Q. Yes, ten or fifteen feet. Now, how far was the second blood spot from the first blood spot that you found?

A. Well, probably ten or fifteen feet; I could not say.

Q. Yes, that is what I am trying to get at. Now, what I want to know is whether these two blood spots near the body were in a line, or whether they were not in a line—in a general line, in a general direction?

695 A. It is my recollection they were in a general line towards the track.

Q. What did you find as to any articles of clothing scattered about the track?

A. There was no clothing except a hat, cuff, five cents in money, I believe, and spectacles.

Q. How far was the hat from the body, as near as you can recollect it?

A. About twelve or fifteen feet, I think.

Q. The hat was nearer than the second blood spot?

A. Yes, sir.

Q. On which side of the body was the hat at that time?

A. On the side toward the track?

Q. What kind of a hat was that?

A. Black derby hat, I believe.

Q. What was the condition of the clothing upon the body, whether it was torn and ragged or whether it was whole?

A. I did not see any rents in the clothing; it seemed to be whole; somewhat mussed up.

Q. What wounds, if any, did you notice upon the body at that time, or on the head?

A. I noticed a wound in the forehead.

Q. Any evidence as to whether the skull was broken or not, apparent?

A. I did not pay particular attention enough to notice whether it was very deep or not.

Q. Now, just state very briefly what was done with the body?

696 A. We went to Sandpoint first, and got some gentlemen there, and came back, got orders, instructions to come back.

Q. Where, if at any place, did you pass any section men in going to Sandpoint?

A. Yes, sir; we went up the track with the train about half a mile, and met the section men, and the conductor told them to go back and watch there until we came back.

Q. What is the fact as to whether the section men started before you left?

A. Yes, sir; they made preparations to go at once.

Q You went on then to Sandpoint?

A. Yes, sir.

Q. How long before you came back again?

A. Oh, possibly an hour or an hour and a half.

Q. What part of that train did you bring back from Sandpoint?
A. Caboose and engine.
Q. How many persons were with you?
A. I don't know as I could tell exactly; I think there was four besides the crew.
Q. Was Mr. Allen one of those?
A. Yes, sir.
Q. When you got back there, state what the fact is as to whether the body was or was not in the same general position it was in as when you went away?
A. It seemed to be exactly in the same position.
Q. Was there any difficulty in noticing, marking the spot where the body lay?
A. No, sir.
Q. Just state to the jury now what landmarks or objects there were there to make it definite where the body lay?
697 A. Well, there was an island in the lake there that you could go by, and also the stone and bush where the body lay.
Q. What kind of a stone was that that you speak of?
A. It was a large ragged stone.
Q. What particular shape or form was there to attract your attention to it?
A. Nothing any more than it was a larger stone than there was in that vicinity, a sharp—running to a sharp peak.
Q. How far was that from Mr. Adams' body?
A. Very close.
Q. Well, when you say very close, give the jury an idea whether it was fifty feet or five feet.
A. Within a foot or foot and a half.
Q. It was within a foot or foot and a half?
A. Yes; very close.
Q. What other stone was there of that size in the vicinity?
A. There was none as large as that that I noticed.
Q. How was that stone, whether it was laying loose on the top of the ground, or imbedded in the ground?
A. It was imbedded in the ground.
Q. Do you know as a matter of fact, have you ever seen that stone since to see whether it was there?
A. Yes, sir; I have noticed it going by there.
Q. Now, Mr. Adams' body was about how close to that stone?
A. Possibly a foot or foot and a half. Very close to it.
Q. How far was his body from the railroad track?
698 A. The nearest rail, I judge at the time it was about thirty-five or forty feet; just from observation.
Q. What is the fact as to whether that was a tangent or a curve at that point?
A. It was a curve.
Q. How far is the level of the track about the level of the point where Mr. Adams' body was lying, at that big stone?
A. Not measuring it, I should judge it was between ten to fifteen feet.

Q. What sort of an embankment is there upon which the railroad track is placed, whether a steep embankment, or a light slope?

A. Well, it was quite steep in one place, and then it slopes off more gradually.

Q. How far down from the end of the ties does this steep embankment extend? About how high would you say the steep embankment was?

A. Oh, six or eight feet.

Q. That steep embankment is faced or riprapped with stone, isn't it?

A. Yes, sir.

Q. At the base of that steep embankment, what kind of ground is there there?

A. Sharp, rugged rocks.

Q. When you say sharp, rugged rocks, what is the fact as to whether they are old water-washed bowlders, or whether they are mixed with rocks that have been blasted from the hillside, or what is the general character of the surface there?

A. All the rock that I seen there seemed to be blasted out from the solid rock; they were all sharp rugged rocks.

699 Q. How far down the slope from the base of this steep embankment did that sharp rugged rock extend, down toward the lake?

A. Some distance and beyond where the body was found.

Q. At the point where the body was found, what sand, gravel or exposed earth was there?

A. Between where the rock ended and the water was sand, coarse sand and gravel.

Q. How far beyond the body was it before this rock surface ended?

A. How is that, please?

Q. How far was it beyond the body towards the lake before the rocky surface ceased and the sand began?

A. Probably fifteen or twenty feet.

Q. What do you know, if anything, about how far the lake short water shore was at that time from the railroad embankment?

A. I couldn't tell exactly, possibly one hundred feet or more.

Q. What do you know, if anything, as to the fact of the lake shore advancing during that winter and spring in the direction of the railroad embankment?

A. I know it did in the spring.

Q. To what extent?

A. Well, from observation is all I could go. It comes up close to the track, possibly within sometimes six feet of the track.

Q. What was the fact that winter and spring as to what it did?

A. It rose quite high.

Q. What did you have to do, if anything, with the moving of Mr. Adams' body?

700 A. I helped to move it onto a litter or kind of stone-boat, and helped carry it up the embankment, and put it in the

caboose, and took it out at Hope, and reloaded it in the caboose—put it back in the caboose; took it to Rathdrum, I believe.

Q. What did you have to do with it after it left Rathdrum, if anything?

A. I helped to take it out of the caboose here at Spokane.

Q. What else did you have to do with it after that?

A. That was all.

Cross-examination.

(By Mr. R. H. VOORHEES:)

Q. How did the body face, Mr. Thompson, as it lay when you saw it?

A. If I recollect right, it laid with the face toward the track.

Q. On which side, or on the back, or how?

A. On the side, on its side.

Q. Which side?

A. Well, I think it was on the left side.

Q. On the left side? Are you sure that that shore is only about one hundred feet from the embankment?

A. I am not sure of the—do you mean to the water?

Q. Yes, sir.

A. I am not sure of the distance; I never measured it.

Q. Are you sure it is not eight hundred?

A. Just from observation; I did not measure it at that time.

Q. Will you swear it was not eight hundred feet?

701 A. No, I would not swear that effect, because I don't know.

Q. You are not very good at guessing distances, are you, Mr. Thompson?

A. Well, I think I can come as near as the average man.

Q. But you don't know whether that was one hundred feet or eight hundred feet?

A. Well, in my judgment it was not eight hundred feet; and I would not say it was only one hundred feet.

Q. You are not sure about it; you cannot reach a conclusion definitely as to whether one hundred and eight hundred?

A. If I had had occasion to stop and go out and have measured it with my eye, I think I could come probably within a few feet, probably within twenty-five feet of the exact distance.

Q. You have been along there a great many times, haven't you?

A. Yes, sir.

Q. You say that that surface there was very heavy, rocky?

A. Yes, sir.

Q. Rocks had been there a long time?

A. Had been there ever since I have been working on the road.

Q. Imbedded more or less in the sand?

A. Yes, sir. Some of it seemed to be, and some of it was loose.

Q. This peaked stone that you speak of, Mr. Thompson, big heavy peaked stone that you say was right near the body there—any blood on it?

A. No, sir, not that I noticed.

702 Q. Any blood where the body was?

A. Close to it there was.

Q. How close to it?

A. I don't know; I don't think that I noticed any any closer than this first spot that I spoke of, ten or so feet.

Q. Ten or twelve feet?

A. Ten or twelve feet, or such a matter.

Q. In which direction was that?

A. Towards the track, diagonally towards the track.

Q. In which direction diagonally?

A. Easterly direction.

Q. Easterly direction, that would be towards Hope?

A. Slightly towards Hope; yes, sir.

Q. Is that the only spot of blood you saw there, Mr. Thompson?

A. No, there was another my attention was drawn to, but I did not pay particular attention to the distance that was.

Q. Where was it?

A. It was in the same direction towards the track.

Q. Diagonally?

A. Yes, sir; somewhat diagonally.

Q. Are those all the blood spots you saw there?

A. Yes, sir.

Q. Certain there were no more in that line?

A. There might have been; I did not——

Q. Did you walk over that line?

A. Not any more than to go up the bank when we moved the body.

703 Q. How did you see? Did you walk right over this line when you took the body up?

A. I couldn't tell; we were pretty busy at that time; it was pretty heavy.

Q. How did you see those blood spots, if you did not walk over that line?

A. Well we saw them when we were looking over the ground in the first place, before we move- the body at all.

Q. Well, then, you did walk over the line, from where the body was to the track?

A. Well, we did that in the examination, in looking around at the time.

Q. Then you did walk over the line, in point of fact, where these blood spots were. If you did not, how did you see them?

A. Why, certainly, we had to look over them.

Q. I am asking you what you did.

A. Yes, I did; I was with the rest of them, and looked over the ground a little bit, and saw these marks, and then we took the body up.

Q. Did you walk from where the body was clear to the railroad track on that line?

A. No, sir.

Q. How far did you walk on it?

A. Possibly two-thirds of the distance.
Q. And in that distance you saw the two blood spots that you speak of?
A. Yes, sir.
Q. That is all you saw?
A. Yes, sir.
Q. Did you examine from the body toward the lake, any?
A. No, sir.
704 Q. Were you back there the next day, when the measurements were made?
A. No, sir.
Q. Or the day after that?
A. No, sir.
Q. Never was there any more?
A. No, sir.
Q. Just have seen that spot when you were riding by on the train?
A. Yes, sir.
Q. Always been able to locate this peaked stone in passing by on the train?
A. Yes, sir, I have noticed it; saw it frequently.
Q. Pretty big stone?
A. Oh, not—I have seen lots larger.
Q. Did you examine the body any, Mr. Thompson?
A. Not any more than a casual examination, the same as the rest; we did not move it, or disturb it any.
Q. Anything found near the body?
A. How is that?
Q. Anything found near the body?
A. Only these articles of clothing that I speak of, the hat and cuff, and glasses.
Q. Where were the glasses found?
A. About four or five feet from the body, I believe.
Q. What else beside the blood did you notice on any of those rocks?
A. I did not notice anything.
Q. Indicating that the body had come in contact with it?
A. I did not notice anything at the time.

705 Re-redirect examination:

Q. Just one question. Did you help lift the body up from the ground?
A. Yes, sir.
Q. What did you notice, if anything, of any blood underneath the body, or underneath the head?
A. There was none that I noticed.
Q. You did — notice any.

(Excused.)

GEORGE CONNORS, testified as follows:

Direct examination.

(By Mr. THOMPSON:)

Q. Mr. Connors, where do you reside?
A. Rathdrum.
Q. What is your occupation?
A. Section foreman.
Q. On what road?
A. On the Idaho division of the Northern Pacific.
Q. How long have you been such section foreman?
A. About fourteen years.
Q. How long have you been foreman on that particular section?
A. About a year.
Q. And where were you serving as foreman on the 13th and 14th days of November, 1898?
A. At Pack river.
Q. Do you know the house that is sometimes called Pack River section-house?
A. I do.
Q. How is it located with reference to the westerly end of the Pack River trestle?
706 A. It is probably five hundred feet from the end of the bridge.
Q. About five hundred feet west of the end of the trestle?
A. Yes, sir.
Q. Is there any other section house there, or was there any other there on the 13th day of November, 1898, except the one you mentioned?
A. No, sir.
Q. And that is what was commonly called Pack River section house?
A. Yes, sir.
Q. And there was no station there at that time, was there?
A. That one building close to the track.
Q. Who was that occupied by on the 13th and 14th days of November, 1898?
A. By me.
Q. What other persons occupied that section house with you?
A. My wife and men that were working on the section.
Q. How many men did you have with you on the section at that time?
A. I believe there were seven or eight.
Q. On the 13th day of November, 1898, do you have any recollection of the train which passed west from Hope towards Spokane, the regular passenger train which was belated that day, do you recollect that?
A. No, I don't remember that.
Q. You don't recollect anything about it?
A. No.

Q. When did you first get any information that any one had been lost off the train that passed along on the 13th day of November, 1898?

707 A. Between eight and nine o'clock.

Q. Of what day?

A. Of the 14th.

Q. Where did you get that information?

A. Between Pack river and Oden.

Q. From whom?

A. Dikeman's head brakeman.

Q. How far were you westerly from Pack River trestle then?

A. Probably three and a half miles.

Q. What did you do when you received that information?

A. I went back and left one man there and went on to Hope and reported.

Q. You say you went back? Who went with you?

A. Three section men.

Q. What did you go back on, afoot or otherwise?

A. Went back on the hand-car.

Q. Where did you find anybody along the road when you went back to the dead body?

A. About one and one-half miles west of Pack river.

Q. How was the body lying, on which side of the railroad?

A. It was lying on the south side of the railroad.

Q. Which way, as to being towards the lake or on the opposite side from the lake?

A. Between the lake and the track.

Q. On the railroad?

A. Yes, sir.

Q. On which side of the railroad as you come towards Spokane?

A. The left hand side.

Q. What is the fact as to whether the line of the road is straight there or whether it is opposite a curve?

708 A. Opposite a curve.

Q. Do you know what the degree of curve is?

A. Six degree curve.

Q. How far was the body when you and the other section men reached it, from the railroad track?

A. I don't know.

Q. About how far; give your judgment.

A. I could not say.

Q. You have no judgment on that question?

A. No, sir.

Q. How was the body lying, Mr. Connors, as to the direction of the head, whether towards Spokane or towards Hope?

A. It was more towards Hope than Spokane.

Q. Was it parallel with the track or how?

A. Head right towards the track, feet towards the lake.

Q. And the head more in the direction of Hope than of Spokane?

A. Yes, sir.

Q. What bush or shubbery was there near the body?

A. There was a bush right at the body.
Q. What portion of the body was next the bush?
A. The back.
Q. And whether that portion next to the head or whether it was the foot that was at the bush?
A. The bush extended pretty near the whole length of the body.
Q. What is the fact as to whether any portion of the body was up on the bush?
A. I believe there was one foot on the bush a little bit and one arm.
709 Q. One arm. What did you notice as to any indications of violence on the body, any injuries, bruises or wounds?
A. I noticed the skull broken.
Q. Where, what part of the skull, if you recollect, whether in the front or back?
A. It was in front.
Q. Do you know whether it was below the hair on the forehead or above?
A. I disremember just where it was now.
Q. You noticed the break in the skull?
A. Yes, sir.
Q. Did you notice any other wounds upon the body?
A. Not to amount to anything.
Q. What was the condition of the clothing, as to being torn or otherwise?
A. That was not much torn.
Q. What did you notice, if anything, as to any other property or any portions of the man's apparel being scattered about?
A. Yes, there was a hat and a cuff there.
Q. Have you any recollection as to which cuff it was, whether the right or left?
A. I have not.
Q. Do you recollect where the hat was lying, how far from the body?
A. Probably twenty-five or thirty feet.
Q. Did you make any measurement at that time?
A. Not at that time.
Q. What did you do at that time before the return of the train, if anything?
A. I left one man there and went to Hope and reported.
710 Q. How did you go to Hope?
A. Went to Hope on a hand-car.
Q. Who was the man you left with the body?
A. It was an Italian.
Q. Do you recollect his name?
A. His first name was Tony; I don't remember the last.
Q. Do you know where that man is now?
A. He is in Italy I think.
Q. You may state when you went to Hope and reported, whom you reported to?
A. To Frank Quinlan, road master.

Q. Where was he?
A. In Spokane.
Q. You reported by wire?
A. Yes, sir.
Q. You simply reported the finding of the body?
A. Yes, sir.
Q. Did you give any directions to do anything?
A. No, I did not, not at that time.
Q. Did you do anything further that day with reference to the body?
A. I did.
Q. What did you do?
A. I helped take it off the caboose at Hope and brought it into the depot.
Q. Did you return before they brought it to Hope; did you return with the body or did you wait until they returned to Hope?
A. I stayed in Hope until they came.
Q. What time, do you know, did they bring it to Hope?
A. I don't remember the exact day.
Q. What did you do with the body at Hope?
711 A. Nothing, only brought it into the waiting-room.
Q. How long did it remain there?
A. I could not say; I went back.
Q. Where did you go to?
A. Back to Pack river.
Q. With your men?
A. Yes, sir.
Q. Did you have anything further whatever to do with the body after that?
A. Yes, they took me up and took me into Rathdrum at the inquest.
Q. As the train came back with the body they took you up and took you into Rathdrum?
A. Yes, sir.
Q. Did they take your men also?
A. No.
Q. When you went to Rathdrum did you have anything to do with the body there?
A. No; nothing.
Q. How long did you remain at Rathdrum?
A. I remained there that night.
Q. Where did you go to from there?
A. Went from there to Hope.
Q. Did you have anything further to do with the body after that?
A. I did not.
Q. When you went back to Hope how soon after that did you go to the place where the body lay?
A. Some time the next day.
Q. Who went with you?
A. Mr. Quinlan and Mr. McAloon.

Q. When you went to the place state what the fact is as to whether or not you found the same place?

712 A. I found the same place.

Q. What enables you, if anything, to locate it?

A. The bush for one thing and then there was a rock there. If anybody could see it once they would know it.

Q. Why?

A. Because it was a peculiarly shaped rock, a kind of basin-shaped.

Q. What marks of blood, if any, were there?

A. There were some marks of blood on the rock.

Q. How about the blood at the base of the bush, the place where the body lay?

A. That is what I say.

Q. That is where this peculiarly shaped rock was?

A. Yes, sir.

Q. What other blood spots were near?

A. There were a few spatters of blood between there and probably twenty feet from there, fifteen or twenty feet.

Q. State to the jury whether you recognized the spot where the body had lain at the foot of the bush or not.

A. I did.

Q. What measurements, if any, did you make from there to the railroad track?

A. We made measurements.

Q. Who assisted you in making the measurements?

A. Mr. Quinlan and Mr. McAloon.

Q. What did you measure with?

A. Measured with a tape line.

Q. How many feet was it from the point at the base of the bush where the body lay to the railroad track?

713 A. I could not say.

Q. Did you make a memorandum of it at the time?

A. Mr. Quinlan did.

Q. Mr. Quinlan made the memorandum as you made the measurement, do you mean?

A. Yes, sir.

Q. I will ask you to state to the jury what the fact is as to whether or not that measurement was made correctly.

A. It was made correctly.

Q. What other measurement did you make besides a straight line from the body to the nearest point on the track?

A. We measured the height of the embankment.

Q. From where the body lay?

A. Yes, sir.

Q. What height was it?

A. I don't remember; we made measurements; he took them down.

Q. I will ask you to state whether they were made correctly?

A. They were made correctly.

Q. What other measurements did you make?

A. We measured from where the body lay back to the track, where the blood spots were.

Q. Did you find the other blood spots that you had seen the day before?

A. Yes, sir.

Q. And you measured through them on a line back to the track?

A. Yes, sir.

Q. Do you recollect what that distance was?

A. No I do not.

Q. I will ask you to state if that was put down at the time?

A. It was.

714 Q. What is the fact as to whether that measurement was made correctly or not?

A. It was correct.

Q. That was the next day after you had taken up the body, was it?

A. The next day.

Q. And about what time in the day?

A. I don't remember the time.

Q. In the forenoon or in the afternoon?

A. I can't say just what time it was.

Q. But you know it was the next day?

A. Yes; the next day, sometime along about noon, probably a little after or before; I could not say.

Q. What do you know, if anything, about the finding of the ring that has been spoken of?

A. Yes, I found a ring there.

Q. Where did you find the ring, Mr. Connors?

A. I found it near where the corpse lay.

Q. And when did you find that, on what day?

A. I don't remember; it was quite a while afterwards.

Q. You did not find it on the day that you picked up the body?

A. No; I did not.

Q. Did you find it on the day that you made those measurements?

A. No.

Q. Some time after that you found it?

A. Yes, sir.

Q. Were you searching or did you accidentally find it?

A. I was searching.

Q. Was anyone with you when you was searching?

A. Yes, sir.

715 Q. Who was it?

A. The section men.

Q. Did you find anything else when you were making that last search, except the ring?

A. That is all.

Q. Mr. Connors, that was you- section, the particular section on which this body was found, was the section that you had been taking care of for years?

A. Yes, sir.

Q. I will ask you to describe to the jury just what kind of a track there was from the end of Pack River trestle, we will say, to the eight-mile post west.

A. It was crooked, curves.

Q. A very crooked track, was it not?

A. Yes, sir.

Q. Do you recollect the tangent or straight line that approaches the six degree curve wh[illegible] you found this body?

A. Yes, sir.

Q. I will ask you to state to the jury what condition that track was in on the 13th day of November, 1898?

A. It was in good condition.

Q. What do you mean by "good condition?"

A. I mean good condition; I don't know as I could make it any plainer.

Q. I will ask you to state what the fact is as to whether it was smooth and properly ballasted?

A. It was.

Q. What kind of ballast was used along there?

A. Gravel and cinders.

Q. What kind of a rail was used along there?

716 A. Sixty-six.

Q. Sixty pounds to the yard?

A. Yes, sir.

Q. What is the elevation, if you recollect, of that six degree curve, the elevation of the outer rail.

A. Five and three-fourths inches.

Q. State to the jury what the fact is as to whether or not that is a proper elevation.

A. Well, yes, I should judge it proper.

Q. What is the condition of that curve as to the track being smooth and properly elevated, or whether it was not?

A. It was properly elevated.

Q. At what time of the year was that road in the best condition?

A. In the fall of the year it would be in the best condition.

Q. Have you seen trains pass there often?

A. I have.

Q. How often would you say trains passed there during the month of November, 1898?

A. I would say two or three every day, probably more.

Q. Do the passenger trains pass?

A. Yes.

Q. What difficulty or trouble was there, if anything, to trains that you know of in passing around those curves?

A. None that I know of.

Q. Did they have any trouble or anything to attract your attention to any defect there in the track?

A. Never.

717 Q. Have any complaints of any kind been made as to its condition?

A. Never.

Q. I will ask you to state to the jury what fault or defect there was, if anything, in the condition of that track at that time?

A. There was none that I know of.

Q. What sort of an embankment is the roadway on there, how much is it elevated up, and how is that embankment constructed?

A. It is constructed of rock, coarse rock.

Q. What do you mean by coarse rock? Give the jury a general idea as to the size of those broken pieces of stone.

A. Rock all the way from half a pound to ten pounds, twenty pounds and fifty pounds.

Q. How are they put in that embankment, whether they are tumbled in loose or whether they are placed by hand?

A. Placed by hand.

Q. How steep is the slope of the embankment proper, that is the portion that has been built by hand, placed in by hand?

A. About like that (illustrating).

Q. How far down does that go before it strikes the loose stone?

A. Probably eight feet.

Q. Then when it goes down to eight feet, what does it strike then, what kind of a slope?

A. At that place there was a bench.

Q. What kind of a bench do you mean?

A. A bench that went out about like that (illustrating.)

718 Q. For about how far?

A. Six feet; six or eight feet.

Q. What was the bench, whether a stony surface or a sandy surface or what?

A. Stony surface.

Q. Was that bench level or slightly sloping?

A. Almost level.

Q. At the end of that six or eight feet of bench, what was then the condition of the ground?

A. A slight slope, gradual slope.

Q. About how many feet in ten would you say?

A. Probably a foot in ten.

Q. About a foot in ten you think?

A. Yes, sir.

Q. Or ten feet in a hundred?

A. Yes, sir.

Q. What kind of surface was that, whether sand or rock or what?

A. It was rock.

Q. At the point where the body was found by this bush, was that a sandy or rocky place?

A. Rocky.

Mr. THOMPSON: I think that is all I desire to ask the witness.

(Thereupon an adjournment was taken until December 4th, 1900, at 9:30 o'clock, a. m.)

TUESDAY, *December 4th*, 1900—9:30 o'clock a. m.

GEORGE CONNORS, on the witness stand.

Cross-examination.

(By Mr. R. H. VOORHEES:)

719 Q. Mr. Connors, what was the date of the measurement made by you, or at least with the assistance of some other persons?

A. On the 15th.

Q. 15th?

A. Of November.

Q. What was the time of those measurements?

A. I don't know the exact time.

Q. Do you remember whether it was in the morning or afternoon?

A. I don't remember; somewhere along about noon or thereabouts.

Q. Do you think it was as late as noon?

A. I could not say.

Q. When you pointed out on that date—on that day when you pointed out where the body lay—to whoever made the measurement—who did make the measurement?

A. I and Dan McAloon made the measurements, and Mr. Quinlan put them down at that time.

Q. He had nothing to do with making the measurements?

A. Who had not?

Q. Mr. Quinlan.

A. Any more than putting them down.

Q. Simply put them down in the book?

A. Yes, sir.

Q. While you and Mr. McAloon made them?

A. Yes.

Q. He had nothing whatever to do otherwise than that?

A. That is all.

720 Q. Now, at that time that you located the spot where the body lay, for the purpose of measuring, did you examine from that spot the ground towards the lake?

A. Not much.

Q. Any?

A. Scarcely any.

Q. Any at all?

A. Not any more than to look at it; there was no examination.

Q. Did you go towards the lake?

A. Not that I remember of.

Q. Did any snow fall on that day, Mr. Connors?

A. Not on that day I don't think. There was some snow the night before.

Re-examination.

(By Mr. THOMPSON:)

Q. Mr. Connors, there was a question that I forgot to ask you yesterday, which I wish to ask now if there is no objection. How far is the lake shore—was it at that time from the railroad track?

A. Oh, it was probably two hundred and fifty feet.

Q. What is the fact as to whether the lake shore all that season remained at that distance from the track, or not?

A. No, it did not.

Q. Just tell the jury what change took place there after the time that Mr. Adams' body was found there, and before that same time next year.

A. Well, the water raised.

Q. To what extent did the water raise there?

A. Probably ten feet over where the body was found.

721 Q. And up to what part of the railroad embankment?

A. About four feet from the track.

Q. How long did it remain in that condition?

A. Oh, at the highest, probably a week.

Q. What effect, if any, did it have in bringing in or washing up sand, etc., in different places?

A. Well, it changed the appearance.

Recross examination:

Q. What did you say this water had done to the ground there?

A. It changed the appearance.

Q. How did it change the appearance?

A. By washing.

Q. Washing what?

A. Washing rocks and gravel.

Q. Where? Did it wash the rocks off into the lake?

A. No; it washed them; it did not wash them into the lake; it surged up against the bank and moved them, some of them.

Q. It moved some of them?

A. Yes.

Q. Big heavy rocks along there, weren't they?

A. Oh, no, not very heavy.

Q. Broken rocks like this, weren't they (indicating)?

A. Oh, they were different kinds of rocks.

Q. Many of them were that big, weren't they (indicating)?

A. Yes.

Q. You say those were covered up by sand?

A. No, sir.

722 Re-redirect examination:

Q. Mr. Connors, how did it come that the water moved the rocks and washed the sand? Just state to the jury what the fact is as to whether that water while it was up there, and at different stages it was always quiet, or whether it was blown by winds.

A. It was blown by winds.

Q. And what effect would that have as to rolling the waves or otherwise in to the shore?

A. It would roll the waves up to the shore.

Q. You know that as a matter of fact therefore from observation?

A. Yes, certainly.

(Excused.)

DAN MCALOON, testified.

Direct examination.

(By Mr. THOMPSON:)

Q. What is your full name?

A. Dan McAloon.

Q. What was your business and employment in November, 1898?

A. Section foreman.

Q. Section foreman on what railway line?

A. Idaho division.

Q. Idaho division of what road?

A. Northern Pacific.

Q. And where was your section?

A. From Hope west.

Q. From Hope west to where?

A. To Pack River bridge.

723 Q. What is the fact as to whether your section and Mr. Connors' section met at the Pack river—west of the Pack River trestle?

A. Yes, sir.

Q. You had the next section east of him?

A. East of him.

Q. When did you first find out that someone, afterwards found to be Mr. Adams, had been missed off of the train?

A. I believe it was called to my attention on the morning sometime on the 15th.

Q. On the morning of the 15th?

A. Yes, sir.

Q. What did you do if anything, with reference to going out there?

A. Well, I got the section men—according to Mr. Quinlan's orders I took them down there.

Q. Who was Mr. Quinlan?

A. The road master.

Q. And you took them down to where?

A. To where Mr. Adams was supposed to have fallen off the train.

Q. And where did you find that place? What kind of a place was it? Describe it to the jury, whether it was on a straight line or a curve, or where it was.

A. It was on a curve.

Q. What kind of a curve?
A. Well, about a six degree curve.
Q. And how far west of Pack River trestle?
724 A. Well I would not be very sure, it was supposed to be a mile and a half.
Q. Who did you find there, if anyone?
A. I did not find anybody when I came down.
Q. What did you do as to examining the place?
A. I held the tape line——
Q. (Interrupting.) Who was with you?
A. Mr. Connors.
Q. Who else?
A. Mr. Quinlan.
Q. Anyone else?
A. Some Italians there that helped to pump the hand-car down.
Q. You were the only three that had anything to do with the measurements, were you, or did anyone else assist?
A. I would not be sure whether any Italian assisted or not.
Q. What kind of a tape line did you have; how long a tape line?
A. I would not be sure of the length of the tape line; fifty feet or seventy-five or one hundred, I am sure; it was at least fifty feet.
Q. Who held the tape line and helped make the measurements?
A. George Connors and I held the tape line, and Mr. Quinlan took down the measurements.
Q. Which end of the tape line did you hold?
A. I am not certain as to that.
725 Q. What was pointed out to you, if anything, as the place to begin measurements?
A. Well, we began measurements on the east end of the curve; according to Mr. Quinlan's orders.
Q. Now, what measurement did you make, if anything, from the point where the body was supposed to have lain, to the track?
A. Well, we measured from the point the body was supposed to be lying, to the track, but I don't recollect what measurement we took.
Q. Who took down the measurements at the time?
A. Mr. Quinlan did.
Q. Who pointed out to you the place where the body was supposed to have lain?
A. Mr. Connors.
Q. What evidence was there there that a body had lain there? What did you see to show you that a body had lain there?
A. I did not see anything; I did not take any interest in looking around anywhere; all I did was to attend to the measurements.
Q. You did not look at any blood spots or anything of that kind?
A. I did not look for anything of that kind.
Q. You simply held the tape line?
A. I simply held the tape line.
Q. Now, I will ask you to state to the jury what the fact is as to

whether or not the part that you took in those measurements was correctly done or not?

A. I believe it was correctly done.

726 Q. So far as what you did yourself, you may state to the jury whether you did it carefully or otherwise?

A. I did it carefully, as well as——

Q. Mr. McAloon, how long have you been in charge of that section that you spoke of?

A. Well I have been at least six years.

Q. I will ask you if you are thoroughly acquainted with the track along at this point where Mr. Adams' body was supposed to have been found?

A. Well, I have been over it a few times.

Q. What do you know, if anything, as to the distance the water in the lake at the shore line was at that time from the railroad track, about how far away was it from the railroad track?

A. Well, I would not be sure how far away it was, but it was perhaps one hundred feet or more; I couldn't tell exactly.

Q. You paid no attention to it at the time?

A. I paid no attention to it at the time.

Q. What do you know, if anything, as to whether the water during thaws and freshets in the springtime advances toward the track along there?

A. Occasionally every year it advances pretty much along there.

Q. How high up does it come?

A. It comes to within about four or five feet of the embankment every year, of the top of the track.

Q. Every year?

A. Not every year; but nearly every year.

Q. What do you know as to how high it came the next spring?

727 A. Well, I believe it came up to within five feet of the track the next spring.

Cross-examination.

(By Mr. R. H. VOORHEES:)

Q. Did you see the body on the ground, Mr. McAloon?

A. No, sir.

Q. You were not there when it was found?

A. No, sir.

Q. You were not there until after it was removed?

A. No, sir.

Q. You have no idea where the body lay except that the spot was pointed out to you?

A. That is all the idea I have.

Q. You were there on the 15th?

A. Yes, sir.

Q. Where the body was pointed out to you, at least the place it

was pointed out to you the body had lain, what was the nature of the ground there?

A. Well, kind of a rocky shore.

Q. Rocky shore all around there?

A. All around there.

Q. And pretty heavy rocks?

A. Pretty heavy rocks, and some gravel, and a little brush.

Q. Rocks imbedded in the sand?

A. Imbedded, and loose, as they will be on the shore, when the water washes them.

Q. That rocky character, that had been there some time, hadn't it?

728 A. Well, it is disturbed more or less every year, that rock, except what is imbedded in, heavy rock.

Q. Except what is imbedded, in heavy rock?

A. Yes, sir.

Q. When you took those measurements who held the tape-line with you?

A. Mr. Connors.

Q. Mr. Connors?

A. Yes.

Q. Who took the measurements down?

A. Mr. Quinlan.

Q. What had he to do with the measurements besides taking them down, anything?

A. Well he had to direct us fellows where to go with our lines and measurements.

Q. Is that all?

A. That is all.

Q. Just directed you where to make the measurements?

A. Just directed us where to make the measurements.

Q. Didn't he take any part in making the measurements himself?

A. Not that I remember; only just the taking down of the measurements.

Q. Didn't do any engineering work?

A. Well, I believe he did with a pole, sighting, the height, the depth of the bank.

Q. Just where were the measurements made that you speak of, Mr. McAlloon?

A. Well, sir, made east from where the body was supposed to be, to Hope, and some direct with the track.

Q. In a diagonal point from the body to the track?

729 A. I believe one measurement was made in a diagonal point.

Q. Why did you make that in a diagonal direction?

A. Well, I believe that was made for some—because the train was running towards Spokane; it was made in that direction, that is what I called a diagonal direction. We made another measurement at right angles with the track.

Q. Was there any indication on the ground over which you ran that diagonal line?
A. I didn't notice any.
Q. Then you don't know why you struck the track at the particular point you did strike it with that line?
A. Well, I measured it according to directions.
Q. You saw nothing on the ground that day?
A. I did not see anything.
Q. No spots?
A. No spots, or any indications.
Q. No spots of blood, or any indications?
A. No, sir, did not see any indications.
Q. But you did go over that line and make the measurements?
A. Yes, sir.

(Excused.)

FRANCIS M. QUINLAN, testified:

Direct examination.

(By Mr. THOMPSON:)

Q. Your name is Francis M. Quinlan?
A. Yes, sir.
Q. What is your occupation?
A. Road-master.
Q. Road-master upon what road?
730 A. Northern Pacific railway.
Q. How long have you served in that capacity?
A. Eleven years.
Q. What has been your division over which you have exercised supervision?
A. It is called the first district, extending from Cheney to Hope, on the main line; the first district of the Idaho division.
Q. State to the jury what your duties as road-master on that division have been during all that eleven years.
A. To see that the track is kept in good condition.
Q. I will ask you to state what was the condition of the track of the Northern Pacific main line from Hope west to Sandpoint on the 13th day of November, 1898?
A. It was in good condition.
Q. What reason can you give to the jury why you now remember its condition?
A. Well, at the fall of the year, we,—the track at that time is in better condition than at any other time.

Mr. C. S. VOORHEES: I think, if your honor please, that is immaterial. The witness has said it was in good condition; now he is asked how he remembers it was in good condition.
Mr. THOMPSON: I will not press it any farther if you do not want me to ask him about that.

Q. Now, Mr. Quinlan, where were you on the 13th day of November, 1898?

A. Spokane.

Q. When did you first learn of the fact that Mr. Adams, or any other person, any gentleman had been lost from the train west of Hope?

731 A. On the 14th day of November.

Q. Where did you get that information?

A. Spokane.

Q. Where did you go in response to that information?

A. To Hope.

Q. What time did you reach Hope?

A. I think it was sometime that night, not positive, but very early on the 15th.

Q. Where did you go then, with reference to the point where the body was supposed to have been found?

A. I went from Hope—I got the section men and went on a hand-car from Hope to where the body was found, or where I was told the body was found.

Q. State to the jury where that spot was, with reference to Pack River trestle and with reference to any curve on the road.

A. A little over a mile and a half from the west end of Pack River trestle.

Q. What is the fact as to whether it was on a straight line or on a curve?

A. On a curve.

Q. Who were the particular persons that were with you that took any action with you in making any measurements there?

A. Mr. Quinlan and Mr. Connors. Some section men were on the car with us.

Q. They were the two section bosses of the sections that met there at Pack river?

A. Yes, sir.

Q. Now, when you got to the point where the body was supposed to have been found, what evidences did you find, if any, that anybody had been lying there?

732 A. There was a few spots of blood, and the rocks were more or less disturbed.

Q. I will ask you to state to the jury where those spots of blood were, with reference to the railroad track at that curve.

A. They were by measurement I found that they were thirty-eight feet from the outside rail of that curve, at right angles.

Q. Where to? From that curve where to?

A. Well, I mean directly towards the lake.

Q. What I am trying to get at, you say they were thirty-eight feet; which one of the spots do you mean was thirty-eight feet?

A. They were very near together, about the size of——

Q. What kind of place was pointed out to you as being the point where the body had lain?

A. It was a rocky place, with one large imbedded rock and a small bush near there.

Q. What evidence did you find at that point that a body had lain there?

A. The spots of blood that I speak of, and also the ground, more or less, disturbed.

Q. Did you see any evidence of people having trampled around there, or could you tell, among the rocks?

A. Not very well.

Q. What is the fact as to whether there is or is not sand and gravel there, or whether it was an entirely stony place?

A. It was a stony surface at that point.

733 Q. You made a measurement from that bush to the railway track?

A. Yes, sir.

Q. At right angles, or how?

A. One at right angles and one diagonally.

Q. The one at right angles would be the nearest direction to the track?

A. The nearest direction to the track.

Q. How far was that measurement, how long was that measurement from the point where the body was supposed to have lain to the track.

A. Thirty-eight feet to the outer rail.

Q. What measurement did you make from the point where the body was supposed to have lain, through the other blood spots and diagonally to the railway line?

A. I made two measurements. I made the first measurement from where the body was to where I was shown a spot of blood, and then continuing—I put a pole up then where the body was, put another pole where this spot of blood was; then sighted along those poles to where that line would intersect the track, presuming that if the body was thrown from the train——

Q. You need not state what you presumed; just state what you actually did.

A. I measured that distance between those poles and found it to be twenty-five feet. Then I continued on that line toward the track.

Q. Now, was that a continuance in the direction of Spokane or in the direction of Hope?

A. In the direction of Hope.

Q. Well, how far did you continue in that direction?

734 A. Until it intersected the track.

Q. What was that distance?

A. Thirty-one feet.

Q. Do you mean thirty-one feet altogether, or making fifty-six?

A. Fifty-six feet altogether.

Q. Fifty-six feet altogether. That intersected the track at what point, whether on the curve or on the tangent?

A. Well, on the curve.

Q. What other measurements did you make?

A. I measured the distance from the beginning of the curve to this point.

Q. To which point?

A. Where I started at right angles.

Q. Oh, yes; to the point where you reached the track at right angles?

A. Yes, sir.

Q. In other words, opposite to where you supposed the body to have lain?

A. Yes, sir.

Q. You measured from the point of curve back toward Hope up to that point?

A. Yes, sir.

Q. What distance was that?

A. One hundred and forty feet.

Q. What other measurements did you make?

A. That was about all; I also measured from the place where the body was at right angles, to the nearest point to the rail, where it intersected the track, along the track.

Q. And what was that?

A. That was forty-five feet.

Q. What measurement did you make to determine the level of the track above the point where the body lay?

735 A. I put a—I had a track *guage* with me, a Huntington track gauge; that has a square at one end, so that you will be able to get very nearly at right angles, or entirely at right angles to the track; I sighted along that *guage* then—I first of all leveled it, because the curve, one side of it was higher than the other, and I had a level, and leveled that so that it would be level, and then I sighted along that to where the body—where I was shown the body was. I had one of the men hold a pole, a long pole, and then I sighted to the point where I had—where that line that I speak of would intersect that pole; I measured that then; and that measured sixteen feet. My idea was to get the depth that the body was below the track.

Q. Well, now, state to the jury how nearly correct that measurement was, if you know.

A. Oh, it would be within a couple of inches.

Q. You will state now to the jury that the body was about how much below the level of the track, or the point where the body was supposed to have lain?

A. Sixteen feet from the top of the rail.

Q. What sort of an embankment is the railway line located on, there Mr. Quinlan?

A. Rocky.

Q. Describe to the jury how that railway embankment is made there, whether it is blasted out of the side of the hill, and the whole description.

A. It is what we call a side-cut, where the rock on the side of the hill is blasted down and then made level. They have to riprap at that particular point on account of the washing of the lake

736 occasionally. The top of that surface, because it is rock, the rock being heavy you know, we cannot get as good a surface

as we can with gravel, and we use gravel and cinders on top of that rock to surface the track. Now, this bank from the ends of the ties is about two and a half feet I should judge; two, to two and one-half feet. Then riprapping commences, and probably goes down a distance of—an abrupt distance of about six or seven feet.

Q. That would make about nine and one-half or ten feet, altogether?

A. Yes, from the ends of the ties. But the two and one-half feet would be level or very nearly as I said, from the ends of the ties. Then there would be an abrupt decline of about six or seven feet.

Q. Now, Mr. Quinlan, supposing that the upper surface of this book, as I am holding it now, was the level railway embankment, and the track upon it, and this the edge of the embankment, and this the riprapping that comes down——

A. Yes.

Q. As I understand you——

Mr. R. H. VOORHEES: Are you going to put that book in evidence?

Mr. THOMPSON: I am just going to let him exemplify the matter in this way.

Mr. R. H. VOORHEES: Then I object.

Q. What do you know, in the last 11 years, as to the fact of whether the lake shore line, the water line, changes at that point during different seasons of the year?

A. It rises every year, every summer.

737 Q. To what extent?

A. To different extents. I should judge all the way from about twelve feet to sometimes twenty feet.

Q. You mean in height?

A. In height, yes. The lake rises.

Q. What do you know if anything, as to what height it rose the next spring and summer after November, 1898, in other words, the spring and summer of 1899?

A. The water rose quite high that year; to probably about four or five feet of the track.

Q. How far up did it extend on this abrupt embankment of the railway line?

A. About a couple of feet, I should judge.

Q. What effect did the advancing of the water have upon the disturbance of the shore surface?

A. Oh, it more or less disturbs the shore; the rocks there; sometimes it is very rough.

Q. In what way does it disturb it?

A. The waves beat up against the shore, and in their receding—it is rough there at times, and in receding it will carry some of the rocks with it, and wash some of the rocks.

Q. What causes there to be any waves there?

A. Wind.

Q. What is the fact as to whether that is a stormy and windy place there, or not?

A. It is particularly windy; quite windy sometimes.

Q. What effect does that have as to the actual disturbance of the loose rock there?

738 A. Washes off the loose rock; very few of them that would not be disturbed, if any.

Q. What effect does it have as to bringing in any sand and gravel at any times?

A. It does; at times, a little sediment; in fact nearly always does.

Q. What condition was the railway track in at the point where you made this examination and those measurements? What condition was the track in at the time you were there and made those measurements?

A. Good condition.

Q. What did you have, if anything, Mr. Quinlan, to do with the examination of the track along in such place, during the year, and at all times, to determine whether it was kept in perfect condition or not?

A. I had to examine it very frequently and see that it was kept properly.

Q. What was the general character of that piece of road from Hope to Sandpoint in the fall of the year 1898, as to being in good or bad condition?

A. It was in good condition.

Q. At the time you made those measurements, Mr. Quinlan, did you take them down at the time?

A. Yes, sir.

Q. Now, how were the measurements made, and how were the figures taken down, whether you exercised any supervision over it or not?

A. I did. I saw that they were correct on the tape line.

739 Q. What will you say to the jury now as to whether or not each and every one of those measurements was correctly made or otherwise?

A. Correctly.

Q. What is the fact as to whether they were at the time correctly recorded or not?

A. I recorded them correctly.

Q. Have you the original record that you made at that time, Mr. Quinlan?

A. Yes, sir.

Q. Where is it?

A. This is it (producing same).

Q. For whom did you make, and at whose command did you make these measurements, and make the record?

A. It is always my business, in case of an accident along my district, to take a record of it.

Q. You say it is always your business. State to the jury whether there is any rule or regulation of your company that requires that of you as part of your duties?

A. Yes, sir.

Q. State what the fact is as to whether that is done in all cases or not.

A. In all cases.

Q. How soon is it done after any accident?

A. As soon as practicable.

Q. State whether this was done in accordance with your regular custom and order?

A. It was.

Q. Now, to whom, or at whose order, or whether in accordance with anyone's order, or only the general rule, was it that you made it?

A. The general rule.

Q. You have the original paper that you made at that time?

A. Yes, sir.

740 Q. State who made all the figures, all the drawings, and all the memoranda that is on that paper.

A. I did.

Q. When did you make them?

A. That day.

Q. I will ask you to state to the jury whether those measurements as recorded there are the same that you recorded at that time.

A. Yes, sir, they are.

Q. State what the fact is as to whether they are correct.

A. They are correct.

Q. State what the fact is, Mr. Quinlan, as to whether the particular figures which indicate any one particular measurement, were put down at the time that measurement was made, or whether you waited until all the measurements were made and then put them down from memory.

A. I put them down just as soon as the measurement was made.

Q. Do you recollect what kind of a tape line that was, what length it was?

A. A fifty-foot tape.

Q. State what the fact is, as to whether that was an ordinary standard tape line.

A. An ordinary standard tape line, furnished by the company for our use.

Q. For your general use in track work?

A. Yes, sir.

Q. What kind of a place was pointed out to you as the particular spot where Mr. Adams' body was supposed to have lain? What marks or indications were there there, in the way of any particular bushes or stones or anything of that kind?

741 A. There was—I noticed a small bush near there; and also a large embedded rock.

Q. How far from that embedded rock was the point where the body was supposed to have lain?

A. I think between that and the bush.

Q. And how close was the bush to the rock?

A. Not very far, about two or three feet maybe, the nearest part of it.

Q. What did you notice at the base of the bush as to there being any spot of blood or any indication as to where the body had lain?

A. There was.

Q. While you were there making those measurements what object of any sort, of apparel or property of the deceased was found, or supposed to be found, if any?

A. Nothing when I was there. I don't know of any.

Q. You found nothing?

A. No, sir.

Q. Mr. Quinlan, what is the fact as to whether this six degree curve at the point where this body was supposed to lie, is the only one, or whether there are a number of those six degree curves along that line?

A. There are several others.

Q. What is there unusual, if anything, about that six degree curve in the line through that mountain division?

A. Nothing unusual.

Q. What curves have you, if any, that are of a higher degree than that?

A. We have several.

Q. Up to what extent?

A. About nine—nine.

Q. What difficulty, if any, have you ever experienced in trains going around any of those six degree curves near the Pack river, or near the Pack River trestle.

742 A. None. There was never an accident since the road was built between Pack river and Oden.

Mr. R. H. VOORHEES: I object, and move to strike that out as entirely irresponsive and incompetent.

(Objection overruled; motion denied; exception allowed plaintiffs.)

Q. What condition has that line been kept in from Hope to Sandpoint since you have been on the road?

A. Good condition.

Q. How much is the outer rail raised in those six degree curves?

A. Oh, about six inches. Five and three-quarters that was; I measured that.

Q. What do you know, if anything, about the extent or width of the lake there, and what opportunity there is for sweep of the wind across it?

A. Well, it depends on the direction the wind is blowing. There is an island probably about, I should judge about a quarter of a mile from the track there; if it is blowing so that that island is in line, then it will be less, but if it gets—there is a chance also of the wind blowing it where it would get a sweep of two to two or three miles, three or four miles; and when it blows that way the waves are very high.

Q. What is the fact as to whether that is a quiet and placid region, so far as wind is concerned about there, or whether it is known as a windy and boisterous country?

A. It is a windy country.

Q. How long have you served on the Northern Pacific
743 railroad altogether besides those 11 years that you spoke of, as road master?

A. Twenty years—twenty-one years.

Q. All on the Northern Pacific system?

A. Yes, sir.

Q. During all that time I will ask you to state to the jury what fully vestibuled trains have been run over that road, if any trains without any unvestibuled cars at all.

A. Prior to 1898?

Q. Yes, sir.

A. None.

Q. Are you acquainted with the peculiar class of cars known as tourist sleepers?

A. Yes, sir.

Q. That have been run over the Northern Pacific road?

A. Yes, sir.

Q. Do you know what the fact was, up to November 13th, 1898, as to whether all of those sleepers that passed over the Northern Pacific road of that character were the property of the company, or whether it hauled different sleepers for different companies, tourist sleepers?

A. My recollection is they were all the property of the Northern Pacific Railway Company.

Q. All that came over that road?

A. Yes, sir.

Q. Now, I will ask you to state to the jury what, if any, of those tourist sleepers were vestibuled?

A. None, up to that time.

Q. I will ask you to state what the fact is as to your having seen a tourist vestibuled sleeper go over that road?

A. I never saw it prior to that time.

Q. What is the fact as to whether other unvestibuled cars
744 besides tourist sleepers were passing over that road at that time?

A. There were.

Q. Of what class of cars?

A. Some day-coaches and some smokers.

Q. What was the ordinary fact as to whether the trains that passed over would have one or more unvestibuled cars in them?

A. They would have; had one at least; I have seen more.

Q. What was the average, as to whether there was more than one or not on each train, as a rule?

A. As a rule at that time?

Q. Yes.

A. Well——

Mr. R. H. VOORHEES: I object, your honor, it is utterly immaterial.

Mr. THOMPSON: I think it is very material, to show Mr. Adams'

knowledge of these unvestibuled cars, for he was riding continually.

The COURT: It is in rebuttal of the plaintiffs' evidence.

(Objection overruled; exception allowed plaintiffs.)

A. Repeat the question, please.

Q. I will ask the question again, the same thing, but in a little different way. What do you know as to whether or not, in addition to the tourist sleepers there was at that time, and for a long time prior to the 13th day of November, 1898, other unvestibuled cars being brought through on those trains?

A. There were.

745 Q. I believe you already stated the character of those cars?

A. Yes, sir.

Q. How would those cars be hauled, whether in any particular part of the train, or wherever they happened to place them?

A. I noticed them generally in the position that this was, ahead of the diner; but I have seen them near the baggage car.

Q. What is the fact as to whether there was anything unusual in seeing at that time an unvestibuled day-coach in those trains?

A. Nothing unusual.

Q. Or an unvestibuled smoking car in those trains?

A. Nothing unusual.

Q. Do you recollect about the time when they first began using vestibuled first-class sleepers on that road?

A. First-class Pullmans you mean?

Q. Yes, sir, the Pullmans, when they first began to use the vestibuled Pullmans on the Northern Pacific?

A. Well, I could only give a rough guess at it; probably about somewhere along about 1892, I think.

Q. What is the fact as to whether these Pullman sleepers were the first or not the first of the vestibuled cars used on the road?

A. They were the first vestibuled cars.

Q. What was the next cars that appeared with vestibules in the trains?

A. First-class day-coaches.

Q. And what was the next that appeared with vestibules?

A. Smokers.

746 Q. What were the next?

A. The tourist sleepers.

Q. Well, what about the diners, when did they appear?

A. That is so—the diners, I should say they were vestibuled next to the Pullman sleepers.

Q. Next to the Pullman sleepers

A. Yes, sir.

Q. And then after the diners, what next?

A. The day-coaches—first-class day-coaches.

Q. About when did the day-coaches begin to appear as vestibuled?

A. Oh, somewhere about 1894 or 1895; I cannot say positively.

Mr. R. H. VOORHEES: What coach was that?

A. The day-coaches, first-class day coaches.

Mr. THOMPSON: When you speak of the first-class day-coaches, do you mean by that that there were two classes of day-coach?

A. Well, we call it the smoker sometimes and day-coach.

Q. Yes. And the first-class day-coaches then began to be vestibuled?

A. Yes, sir.

Q. And you say up until November, 1898, only a portion of them were vestibuled?

A. Yes, sir.

Q. And when did the smoking-cars begin to be vestibuled?

A. Oh, I should judge somewhere about 1895 or 1896; somewhere along there.

747 Q. What is the fact as to whether they were all vestibuled or not up to the 13th day of November, 1898?

A. They were not.

Q. Do you know whether they have all become vestibuled even yet?

A. I do.

(Plaintiff objects. Objection sustained.)

Q. Never mind. Do you know, Mr. Quinlan, about what the total amount of the equipment on the Northern Pacific railroad was, that is, passenger equipment was, along about November, 1898?

A. I don't know.

Q. I will ask you if you know about what percentage of that equipment was vestibuled at that time.

(Plaintiffs object, the witness having already said he did not know. Objection sustained.)

Cross-examination.

(By Mr. R. H. VOORHEES:)

Q. I would like to ask the witness a question about this paper, Mr. Thompson, before you introduce it (the paper produced by the witness). Was this paper made on the ground at that time?

A. Not on the ground; no.

Q. You say this was taken shortly after the accident?

A. The same day.

Q. When was that?

A. The same day, just as soon as I got to Hope.

Q. Then you wrote this down afterwards from memory?

748 A. No; I had it in a book. I took the notes in a book, and drew this diagram at Hope from the notes I took in the book.

Q. So that this is not the same thing that you made at the time, this is copied from another paper?

A. I drew that the same day.

Q. Yes, but not at the time you made the measurement?

A. No.

Q. Or when you were on the ground?

A. No.

Q. You relied for this drawing on you- memory and the record that you made at the time?
A. Yes, sir; the record that I made at that time.
Q. You did make another record at the time?
A. I did.
Q. And this is not it?
A. No.

Mr. R. H. VOORHEES: I object to this, your honor, on the ground that it is made after the events; it is a record made after the events, and copied from another record; it is not the original record as made.

The COURT: It is not a record at all; it is simply a diagram illustrating the witness' testimony; it is putting on paper his memory at that time of what he saw on the ground; that is all it is good for.

Mr. THOMPSON: That is what I asked to introduce it for, your honor.

The COURT: I overrule the objection.

(Document marked Defendant's Exhibit No. 1.)

749 Q. Now, Mr. Quinlan, what time in the morning did you come to this spot?
A. To the best of my belief it was about noon.
Q. About noon.
A. I am not particular as to the time, but I think about that time.
Q. Are you pretty certain about that time?
A. No. I know it was in daylight, and I think about noon; I am positive it was not very long after noon.
Q. Are you sure that it was as late as noon?
A. As I say, I am not positive as to the time.
Q. Would you say it was as late as 11 o'clock?
A. It was probably, it might be, I cannot tell, I am not certain as to the time.
Q. Would you say it was as late as 10 o'clock?
A. Well, probably it was, in all probability, yes.
Q. You are pretty certain it was as late as 10 o'clock?
A. Yes; for the reason of the time it would take me to go to Hope; that is all I judge from.
Q. What is your best judgment about that, what does your memory tell you now? Your memory has been pretty good about other matters here.
A. I don't remember; it was somewhere about 10 or 11 o'clock; about noon, maybe. We stayed quite a long time there on the ground.
Q. Are you sure it was not as early as 9 o'clock?
A. I think not.
Q. Are you sure about that?
A. No—yes, I should judge not.
750 Q. Your memory is a pretty good memory, isn't it?
A. Excellent.

Q. And you are certain that it was not as early as 9 o'clock?
A. No.
Q. Or about there?
A. I don't think it was. It might be somewhere—as I say, I am not certain as to the time. I know it was daylight. I know what we done was in daylight; I remember that.
Q. Now, Mr. Quinlan, just to show you that even those who have the best memories may forget things, let me ask you this. I will ask you if on the former trial you were not asked, and if you did not testify as follows: "And out to where it was pointed out to you the body was found; on what date did you go there? Answer: On the 15th? Question: What time on the 15th? Answer: In the forenoon. Question: In the forenoon about when? Answer: Well, we started from Hope, I should judge, about half-past seven or eight o'clock and got there about nine. Question: Got to the curve? Answer: Yes, sir." Is that correct?
A. Probably so.
Q. Was it true then?
A. Yes.
Q. Is it true now?
A. I think so.
Q. Any snow on the ground, Mr. Quinlan?
A. I don't think so. I am sure there was not on those rocks; if there was, there might be a little in crevices around, or something like that.
Q. You don't remember about that, do you.
751 A. I am sure there was not where we were measuring.
Q. That is on those rocks around there, over the ground that you went?
A. Yes, sir.
Q. No snow there?
A. No; snow there.
Q. You are sure of that?
A. Yes.
Q. If there had been any about there you would have seen it, wouldn't you?
A. Yes, sir.
Q. Did it snow any that day?
A. Not while I was out.
Q. How late did you stay out?
A. I cannot tell you that.
Q. You started at seven or eight o'clock?
A. Yes.
Q. And you were on the ground until noon?
A. We were on the ground, I should judge, about a couple of hours. That is the best of my recollection. I did not keep any tab on the time.
Q. Now, Mr. Quinlan, you stated in your direct examination that you made measurements, and that there were some spots of blood which were thirty-eight feet from the track in a straight line or right angles?

A. Yes, sir.
Q. How many of those spots that were thirty-eight feet?
A. I think two or three.
Q. How far apart were they?
A. Oh, I think about your hand—the palm of your hand would cover them.
752 Q. That was near the bush you speak of?
A. Yes, sir.
Q. Did you notice any other marked feature of the ground about that bush?
A. This large rock.
Q. What kind of a rock?
A. It was quite a large rock, much larger than any other rock around, and it was imbedded in the ground.
Q. Any blood on it?
A. I didn't see any on that.
Q. Where was the blood you speak of?
A. It was on the ground there, near the bush.
Q. On the ground or on the rock?
A. Well, on the rocks.
Q. Scattered over several rocks?
A. No, as I say it was—about the palm of your hand would cover where the blood was; maybe two or three little rocks there.
Q. What kind of disturbance of the ground did you notice that you speak of?
A. Well, rocks disturbed.
Q. How disturbed?
A. Well, pushed away from one place to another, apparently as if a body laid there.
Q. Well, would the laying of a body there push rocks away?
A. I should judge so, that is the way it looked to me.
Q. Wouldn't it help to hold them down, rather?
A. If a body is in motion it will shove some of them away.
753 Q. Then, you think when the body got there it shoved the rocks away?
A. That is the way it looked.
Q. Were not there rocks under the body?
A. There were; that is the place where I was shown where the body was.
Q. Well, if the body had pushed them away, they would not be under it, would they?
A. It need not push them away altogether, but it could disturb them by moving them some.
Q. How big were those rocks that had been pushed away?
A. Small rocks, about the size of your hand, maybe, or a little more
Q. What made you think they had been pushed away?
A. By the appearance of the ground.
Q. How? What appearance was there?
A. Well, if you move a rock of that kind away you will see some little signs around there that it was moved.

Q. Do you mean holes in the sand.
A. Partly so.
Q. How is that?
A. Partly so; disturbed; I think that is as well as I could say.
Q. Were there holes in the sand where rocks had been torn out?
A. No.
Q. Well, if the rocks had not been torn out, how were they left?
A. They were laying on top of the ground.
754 Q. Been pushed on the ground, you think?
A. Yes.
Q. Now, Mr. Quinlan, who held the tape-line?
A. Mr. Connors and Mr. McAloon.
Q. You had nothing to do with that?
A. No.
Q. You just pointed out to them where they were to do the work?
A. Yes; and looked to see whether the figures were correct, the measurements made correctly.
Q. You state that you have seen the unvestibuled tourist cars up next to the baggage car.
A. I have occasionally.
Q. That would be occasionally?
A. Yes, sir.
Q. That would be in front of all of the balance of the passenger equipment of the train, wouldn't it?
A. Yes.
Q. It did not seem to do the train any harm in any way, having the tourist-car up next to the baggage-car, when you saw it, did it?
A. No.
Q. It was not interfering with the train in any way when you saw it?
A. No.
Q. It seemed to run fairly easy and well there, didn't it?
A. As far as I could judge, yes.
Q. When was the vestibuling appliance first used on the Northern Pacific?
A. As I say I am only judging at a guess, I have not any accuracy about the time, but I should judge to the best of my belief about 1892 the first vestibules were put on.
755 Q. That would be about six years prior to this accident?
A. Yes, sir.
Q. You say that all of the tourist sleeping cars were the property of the Northern Pacific?
A. That is my belief.
Q. You never saw one of any other road, you stated, run over there?
A. No, I don't remember.
Q. Didn't you state you did not?
A. That is the best of my belief, I did not.
Q. Where were these trains made up, Mr. Quinlan?
A. I don't know.
Q. Haven't you any idea?
A. No—why, possibly in St. Paul.

Q. St. Paul?
A. I don't know that.
Q. How long have you been on the Northern Pacific railroad?
A. Twenty-one years.
Q. What positions have you occupied?
A. Track-layer, material agent, tie inspector, road master.
Q. And on what parts of the road have you worked?
A. Well, always between Ainsworth and Hope.
Q. Where is Ainsworth?
A. It is on the Snake river, near Pasco.
Q. And in twenty-one years you have never learned where those trains are made up?
A. No, sir.
Q. You don't know where they started from?
A. No.
Q. Don't know where the line begins, do you?
A. I cannot say correctly; Duluth I think I heard them say. I don't know of my own knowledge.
756 Q. Do you know where it ends?
A. I should judge so; you could call the end of it Portland, Tacoma, or Seattle.
Q. Do you know where these trains run to?
A. Yes, sir.
Q. Where do they run to?
A. They run to—I am sure they run to Tacoma, and then I don't know whether they run through to Portland or not of my own knowledge.
Q. You don't know where they start from?
A. No.
Q. Have you any idea?
A. Yes.
Q. Where?
A. Some of them start from St. Paul.
Q. How did you get that idea?
A. Just from listening to people talk.
Q. By persistent inquiry during that twenty-one years?
A. No; it did not interest me; it was not my business.
Q. Did you ever see a schedule of the running of the road during that twenty-one years, Mr. Quinlan?
A. The schedule that I am furnished is the schedule of this division; that is the only thing that interests me.
Q. You never saw a time schedule, the ordinary folders that are scattered all over the road?
A. Yes, yes, I have seen them.
Q. Don't they tell you where the trains start from?
A. I am not quite sure. They start from Duluth; you
757 can travel from Duluth, I know that; but whether that train that comes out here starts from Duluth or not, I cannot say, after twenty-one years' experience.
Q. Well, what was the usual order of these trains when they passed by where you could get your eye on them, Mr. Quinlan?

A. Mail, baggage, express, smoker, day-coach, tourist sleeper—sometimes more than one—and dining-car, and then some Pullman sleeper, sometimes more than one.

Q. Pullman sleeper, usually on the rear?

A. Yes, sir, except a private car—not always.

Q. Nearly always?

A. Yes, nearly always.

Q. Customarily so?

A. Yes, sir.

Q. Are the sleepers all Pullman sleepers that run on the Northern Pacific?

A. Yes, sir.

Q. You don't know where they come from, do you?

A. No.

Q. You don't know where they are put on?

A. No.

Q. Where they carry passengers from?

A. No.

Q. You couldn't tell whether they start at Helena, Montana, or at Duluth, or at St. Paul?

A. I could not.

Q. What is the next station east of Hope on the Northern Pacific?

A. Clark's Fork.

Q. Could you tell whether they started from Clark's Fork or not?

A. I should judge not.

Q. You rather think that way, don't you?

A. I do.

758 Q. How do you know that?

A. Only from knowing Clark's Fork to be a small station, and thinking it improbable that they would start from there; I don't know it to be an absolute certainty. There may be some reason that they would pick up a sleeper there; all I know.

Q. You know the train does not start from there?

A. I do; I know it does not.

Q. How do you know that?

A. Because I have seen it go by there.

Q. Have you been east farther than Clark's Fork?

A. I have.

Q. How far east?

A. How far east?

Q. Yes, sir.

A. To the old country.

Q. Well, in going east, did you go on this road?

A. I did.

Q. How far did you go?

A. I went to St. Paul on this road, and then took some road to Chicago, I think the Wisconsin Central.

Q. When you came back how did you come back?

A. On this road.

Q. Where did you start?

A. St. Paul.
Q. You know that train started at St. Paul, don't you?
A. Yes, sir.
Q. Made up there, wasn't it?
A. No, I don't know.
Q. Where was it made up?
A. I don't know.
759 Q. Haven't any idea where it was made up?
A. No, sir.
Q. Couldn't say whether it started from there or not?
A. I came into the Union depot at St. Paul and I got on a train, Northern Pacific train, I couldn't tell whether it was—where that train was made up.
Q. Never made any inquiry then?
A. I did not.
Q. Whether it started from there or not?
A. I did not.
Q. Never looked at your folder?
A. No.
Q. Never received an atom of information whether the train started from there or not?
A. No.
Q. Have you been east before that or after?
A. Yes, sir.
Q. How many times?
A. I have been as far as St. Paul about twice, I think.
Q. Always come back from there over the road?
A. Yes, sir.
Q. Always started from there?
A. Started from the Union depot.
Q. You knew the train started from there, didn't you?
A. I knew the train started from there.
Q. Never knew whether it was made up there?
A. I did not.
Q. Do these through trains run from Duluth to St. Paul and then across this way?
A. I am sure I don't know.
Q. Never saw a folder on that proposition, did you?
A. No, sir.
760 Q. Nor in twenty-one years received any information, did you?
A. No, sir.
Q. When you did come back, did you come back in a sleeper?
A. I came back once in the sleeper.
Q. Did the sleeper stay in the same place when you came back that time?
A. It did. This was——
Q. Where was the sleeper?
A. At the rear end, I think, or the second rear car on.
Q. It stayed there?
A. Yes, sir.

Q. And you came right through with it there?
A. Yes, sir.
Q. The dining-car came along also?
A. I should judge so, but I don't think—I am not quite sure.
Q. They may have picked up a dining-car?
A. Once they did; I am sure of once.
Q. You don't know about any other time?
A. No.
Q. You say you have been on the road twenty-one years?
A. Yes, sir, twenty-one years next April.

(Excused.)

761 T. F. BARRETT, testified:

Direct examination.

(By Mr. THOMPSON:)

Q. Mr. Barrett, what is your occupation?
A. Car inspector.
Q. On what road?
A. The Northern Pacific; Idaho division.
Q. How long have you been car inspector of the Idaho division?
A. Since December, 1896.
Q. What were your duties as car inspector during all of that time?
A. To inspect all trains, test air, and see that everything was in working order on all trains.
Q. I will ask you to state to the jury if you recall the passage west, of the train from Hope, Idaho, to Spokane, in the afternoon of the 13th day of December, 1898.
A. Yes, sir, I inspected the train at Hope.
Q. Do you recall about what time it reached and left Hope?
A. Well, I could not say exactly what time; it was something after five o'clock it got in, Rocky Mountain time.
Q. By the Rocky Mountain time?
A. Yes, sir.
Q. And left at what time?
A. Shortly after four.
Q. About shortly after four o'clock?
A. Shortly after four o'clock.
762 Q. They change an hour at Hope, from the Rocky Mountain to Pacific time?
A. Yes.
Q. Now, you may state what you did as to inspecting the train, briefly, I don't care to go into it to any great extent.
A. Well, when the train pulled in, I proceeded to inspect at the rear end, and inspected through from the rear end, and when I got through I felt of all the oil-boxes and saw that the running gear was in running order; and when the engineer got on to take the train west I gave the engineer the signal to set the air, and saw

that the air was in working order, and pulled the signal cord, and gave him the signal to release the air.

Q. Now, you may state to the jury whether you did or did not do all the things necessary for the proper inspection of the train.

A. Yes, sir, I did.

Q. What was the condition that the train was in when it left Hope, Idaho?

A. The train was in perfect condition.

Q. Do you recollect how many cars were in that train?

A. Eight cars.

Q. What did they consist of?

A. The mail-car, baggage-car, express, smoking-car, first-class car, tourist sleeper, diner, and Pullman sleeper.

Q. Was that the order in which they were placed, from front to rear?

A. Yes, sir, I think it was.

Q. Do you remember what the fact is as to whether those tourist sleepers were hauled only on that particular day, or whether it was customary to have a tourist sleeper on the trains that passed there?

763 A. It was customary to have a tourist sleeper.

Q. How many tourist sleepers would there be on each of the passenger trains going through Hope, passenger trains going west?

A. There was hardly ever more than one.

Q. There was usually one?

A. Yes, sir.

Q. I will ask what the fact was, whether those tourist sleepers were or were not vestibuled?

A. I never had seen one vestibuled that I can remember up to that time.

Q. What is the fact as to whether the one on that day in question was a vestibuled tourist sleeper?

A. I don't think it was vestibuled, no, sir.

Q. You don't know that you ever had seen one up to that time?

A. No, sir, I don't. I don't believe I had.

Cross-examination.

(By Mr. R. H. VOORHEES:)

Q. That tourist-car had neither gates nor other appliance or device closing in the side of the platform, had it?

A. No, sir.

Q. Entirely open?

A. Yes.

Q. You passed up and down through there without any obstruction at all?

A. Yes, sir.

Q. That is true as to all of the platforms, wasn't it?

A. On the tourist sleeper?

Q. On the tourist-car.

A. Yes, sir.

Q. Was the makeup of that train as it passed through there usually the same as it was on that day.

764 A. Well, they had a short time before, I believe, begun to put the sleeper in that position; but the first way they had made up, the tourist sleeper was next to the express-car; but it was sometime before that they had commenced to put the sleeper back in that part of the train, I believe.

Q. They had changed that?

A. Yes, sir.

Q. And put it in the middle of the train?

A. Yes, sir.

Q. Had the train, as it came through for some time past, been made up with the same order in which it was on that day?

A. Yes, sir.

Q. You had not noticed any variation in the order?

A. No, sir, I had not.

Q. At all for some time?

A. Not for some time before.

Q. That was the usual order?

A. Yes, sir.

Q. The customary and usual order?

A. Yes, sir.

Q. For that train to run, when it came by that place, in the order that you have mentioned?

A. Yes, sir.

Q. Do you know where that train was made up, Mr. Barrett?

A. No, sir, I do not.

Q. But you had always seen it made up that way?

A. It was always made up that way when it came through there.

(Excused.)

765 PETE SMITH, testified:

Direct examination.

(By Mr. THOMPSON:)

Q. Mr. Smith, what is your occupation?

A. Car inspector.

Q. Where?

A. For the Northern Pacific at Spokane.

Q. How long have you been such car inspector?

A. Since 1892.

Q. Since 1892. What trains has it been your duty and practice to inspect, as such car inspector?

A. All trains coming through on the main line and branches of the Northern Pacific.

Q. Do you recall the train which came in from Hope, Idaho, on the 13th day of November, 1898, reaching here late in the afternoon of that day?

A. Yes, sir.

Q. I will ask you to state to the jury who inspected that train.
A. I inspected one side of it.
Q. Who inspected the other side?
A. Mr. Holien.
Q. What did you do as to making a thorough or only partial inspection of your side?
A. I made a thorough inspection of it.
Q. State to the jury what condition you found the train in, as to being in or out of repair?
A. I found it in good condition.
Q. Any defect in any way?
A. No defect of any kind.
766 Q. Do you recollect how that train was made up?
A. No, not for certain; it was made up, I think, of a mail-car, a baggage-car, express-car, smoking-car, first-class coach, tourist-car, dining-car and sleeper.
Q. That would make eight cars?
A. That was the order they came in here.
Q. That was the order they came in here. Now, I will ask you to state whether that is the order in which they appeared, from the engine back, as you have mentioned?
A. Yes, sir.
Q. What kind of a tourist sleeping-car was that? Was it a vestibuled car or not?
A. It was a nonvestibuled car.
Q. What was the practice at that time, when the trains would come in, as to whether there would or would not be a tourist-car in each train?
A. There was always a tourist-car.
Q. State what the fact is as to where that tourist-car would be placed in the trains when they came into Spokane?
A. It was usually placed next to the diner. There was exceptions where it was not.
Q. When it was not placed next to the diner, where would it be?
A. Usually one car from the diner; ahead of it.
Q. Ahead of it. How many tourist sleepers would there usually be on the train?
A. There would usually be one.
Q. What is the fact as to whether those tourist sleepers would usually be vestibuled or not vestibuled.
767 A. Those tourist sleepers?
Q. Yes.
A. They were nonvestibuled.
Q. Did you ever see any tourist sleeper up to that time that was vestibuled?
A. No, sir, I never had.
Q. Who did you say the other inspector was, that took the other side of that train?
A. Mr. Holien—H. A. Holien.

Cross-examination.

(By Mr. R. H. VOORHEES:)

Q. There was no bar of wood across the opening to and from the platforms, or bar of iron, or iron gate, or any other contrivance, which would close in that open space to and from the platform on that car, was there?

A. No, sir; there was nothing.

Q. Or any of the platforms?

A. Not on the tourist car.

Q. All open?

A. Open.

Q. Not enclosed in any way?

A. Not enclosed in any way.

Q. Do you know where the train was made up?

A. I do not.

Q. Was the order in which you have stated that train was made up the customary and usual order in which that train came in?

A. Yes, sir; that was the customary order; seldom an exception.

768 Q. Including all the cars?

A. Including all the cars.

Q. There had been a time when that tourist car was carried up near the baggage-car or express-car, wasn't there?

A. Occasionally it was carried there. I never remember of any regular time when it was customary to carry it next to——

Q. That is all.

HENRY HOLIEN, testified:

Direct examination.

(By Mr. THOMPSON:)

Q. State your full name, Mr. Holien.

A. Henry Holien.

Q. State what your business is, and has been for some years.

A. Car inspector.

Q. On what road?

A. The Northern Pacific.

Q. How long have you served as car inspector?

A. Since 1887.

Q. At what point?

A. At Spokane.

Q. State to the jury what your duties as car inspector are, with reference to trains that reach Spokane.

A. To inspect all trains on the main line and branches.

Q. I will ask you if you recall the train that reached Spokane late in the afternoon of the 13th day of November, 1898, from Hope, Idaho?

A. Yes, sir.

Q. Who inspected that train on its arrival at Spokane?

A. I and Peter Smith.

769 Q. Which side of the train did you take to inspect?

A. The north side.

Q. I will ask you to state what examination you made; whether a thorough or only a partial examination.

A. I gave it a thorough inspection on my side.

Q. State to the jury what condition you found it in on that side.

A. I found it in good condition.

Q. Any defect of any sort?

A. Not as I could discover.

Q. If there had been any defect, state what the fact is as to whether you would have discovered it.

A. I would.

Mr. C. S. VOORHEES: We object to that character of examination, if your honor pleases.

(Overruled. Exception allowed plaintiffs.)

Q. What cars, were in that train? What was the makeup of the train, from the engine back to the end of the train?

A. Mail-car, baggage-car, express, smoking-car, day-coach, tourist-car, dining-car, and sleeper.

Q State what the fact is as to whether that tourist-car was or was not a vestibuled car.

A. No, it was a nonvestibuled.

Q. What was the practice of the road in running trains from the east into Spokane, passenger trains, as to whether there was or was not usually a tourist-car in the train?

A. There was, yes.

Q. Where was that tourist-car usually hauled, Mr. Holien?

770 A. Between the diner and the day-coach.

Q. Was it or was it not at any time hauled in any different place?

A. Not, since I worked for the company.

Q. Usually between the diner and the day-coach.

A. Yes, sir.

Q. Do you recollect on that particular day where it was?

A. Yes, sir.

Q. Where was it?

A. Right between the diner and the day-coach.

Q. What was that tourist-car—I believe you stated that it was not vestibuled.

A. Yes, sir.

Q. What is the fact as to whether the tourist-cars that usually came in over the road were or were not vestibuled?

A. They were not vestibuled.

Q. Up to that date had you ever seen a vestibuled tourist-car on the train?

A. No, sir.

Q. How many tourist-cars usually came on each passenger train?

A. Usually one.

Cross-examination.

(By Mr. R. H. VOORHEES:)

Q. Was there any iron gate, or wooden gate, or wooden bar, or iron bar, or chain, or any other device, across the opening by which you go to the car?

A. No, sir.

Q. To any of the platforms?

A. No, sir.

771 Q. Entirely open and unobstructed?

A. Yes, sir.

Q. Did you ever see one of those tourist-cars that had any chain, wooden bar, iron bar, gate, or anything else, obstructing the opening to the car?

A. No, sir.

Q. Did the train come through usually in the order that you have enumerated these cars?

A. Yes.

Q. That was the usual and ordinary customary order, was it?

A. Yes, sir.

Q. That it came through this place in?

A. Yes, sir.

Q. Do you know where the train was made up, Mr. Holien?

A. I do not.

Q. Do you know whether that tourist-car was a Northern Pacific car?

A. Yes, sir.

Q. You are sure of that, are you?

A. Yes, sir.

Q. Had the Northern Pacific name on it?

A. Yes, sir.

Q. That was the tourist-car you were just speaking about?

A. Yes, sir.

(Excused.)

A. H. SIMMONS, testified as follows:

Direct examination.

(By Mr. THOMPSON:)

Q. State to the jury where you reside.

A. Spokane.

Q. How long have you resided here?

A. Eleven years.

772 Q. What has been your occupation during that eleven years?

A. Railroading.

Q. What is that?

A. That first year as baggage agent on the Northern Pacific and the balance depot master.

Q. What has been your duties during the last ten years as depot-master?

A. Handling passengers in and out of trains.

Q. What depot have you reference to?

A. Northern Pacific passenger station.

Q. In the city of Spokane?

A. Yes, sir.

Q. Now, describe to the jury what your duties called upon you to do with reference to noting the arrival and departure of trains.

A. To call trains and see that each and every one has a ticket to the departing of the trains.

Q. When persons are departing to trains where do you locate yourself so as to determine that?

A. At the passenger door.

Q. The door that leads out to the trains?

A. Yes, sir.

Q. What is the fact as to whether passengers are or are not permitted by you, and have been during all of those years to go out without first observing their tickets?

A. They are occasionally.

Q. In what cases?

A. Where I am personally acquainted with them.

Q. State what the fact is as to what your acquaintance with Mr. Adams was in his lifetime?

773 A. I have been personally acquainted with him for several years.

Q. I wish you would describe Mr. Adams to the jury as to his physical characteristics—what kind of a looking gentleman he was.

A. He was a medium-sized, quite heavy, smooth-faced man.

Q. About how much would he weigh, in your judgment?

A. About two hundred, I should judge.

Q. State whether he was a tall or short man.

A. Short.

Q. What was his appearance as to being large-bodied or small-bodied?

A. Large-bodied.

Q. What was his general appearance as to wearing beard or being smooth-shaven?

A. Smooth-shaven.

Q. What was his complexion, as to being pale or florid or flushed?

A. Rather flushed?

Q. How often do you know of Mr. Adams taking passage upon the Northern Pacific trains in the last two or three years of his life?

A. Quite often.

Q. Trains going in which direction?

A. Both east and west, north and south.

Q. How familiar did you become with him and his taking passage?

A. Quite familiar.

Q. Do you recall the time when Mr. Adams' dead body was brought to Spokane?

A. No, sir; I was not on duty.
Q. You were not on duty at the time it was brought on?
A. No, sir.
774 Q. Had you been on duty during the two or three days preceding?
A. Yes, sir.
Q. What were your hours of duty?
A. After the departure of trains I am not on duty.
Q. It is only when trains depart that you are on duty?
A. That is it.

Cross-examination.

(By Mr. R. H. VOORHEES:)

Q. You say that you had let Mr. Adams through the door frequently?
A. A good many times.
Q. A good many times?
A. Yes, sir.
Q. But you could not say whether he took the train on those occasions, all those occasions?
A. I would not swear to it; no, sir.
Q. Frequently you let people through, do you not, who do not take trains?
A. Yes, sir; to meet friends.
Q. You have been kind enough to let me through two or three times, haven't you?
A. Those I know.
Q. You simply know that Mr. Adams had gone through your door there, but how often he has taken the train there you have no knowledge?
A. No, sir; I don't know.
Q. It very frequently happens that people go through and do not take trains. You have no knowledge of whether he got on the train on those occasions?
A. I could not say; no, sir.

(Excused.)

775 W. E. PRESTON, testified as follows:

Direct examination.

(By Mr. THOMPSON:)

Q. What is your name?
A. W. E. Preston.
Q. Where do you reside?
A. In Helena, Montana.
Q. Were you acquainted with Jay H. Adams in his lifetime?
A. Yes, sir, I was.
Q. Where did you become acquainted with him and learn to know him?

A. I gradually became acquainted with him on the trains by seeing his pass—his name on his pass—"Jay H. Adams."

Q. What kind of a looking man was Mr. Adams?

A. He was a short, thick, heavy-set man, with rather a florid complexion.

Q. What kind of a beard did he wear?

A. Smooth-shaven, I believe.

The COURT: Why is it necessary to amass so much testimony about Mr. Adams' personal appearance? Is there any dispute here about the size and shape and color of the man?

Mr. THOMPSON: Nothing, except to be sure that each witness identifies the same man. I don't want to have it argued to the jury that there are lots of men with the same characteristics and anybody might be mistaken for him; that is all.

776 Q. What were your duties during the two or three years preceding the 13th day of November, 1898?

A. Passenger conductor running on the Rocky Mountain division.

Q. Of what road?

A. The Northern Pacific.

Q. When you say that you became acquainted with Mr. Adams gradually, state what run, on what road it was that you became acquainted with him.

A. I was running between Spokane, and Helena, Montana, during that time.

Q. How often have you seen him between Spokane and Helena, Montana, in the two or three years before the 13th day of November, 1898?

A. I have seen him a number of times; I could not state how many times.

Q. Any other points than those you have named, between Spokane and Helena?

A. I have seen him between Hope and Spokane. I was introtuced to him between Hope and Spokane about four days before he met his death.

Q. Who introduced you?

A. Dr. Sieberg, of Hope, Idaho.

Q. Where was that introduction?

A. They were sitting in the first-class day-coach at the time.

Q. Who was the conductor of that train?

A. I was the conductor.

Q. How was that train made up as to character of cars contained within the train?

777 A. First was the mail-car from the engine, baggage-car, express-car, smoking-car, first-class day-coach, tourist-car, dining-car, and sleeping-car.

Q. What do you know, if anything, as to whether that order or a different order was usually maintained in the trains run over the Northern Pacific railroad at that time?

A. That was the usual order of the trains.

Q. What is the fact as to whether one or more tourist sleepers were usually carried on those trains?
A. They carried more than one at times, yes.
Q. What is the fact as to whether as many as one car at all times or not?
A. They carried one as a usual thing: sometimes two.
Q. What is the fact as to whether those tourist sleepers were or were not vestibuled?
A. They were not vestibuled.

Cross-examination.

(By Mr. R. H. VOORHEES:)

Q. Mr. Adams was quite a short man, wasn't he?
A. Yes, sir.
Q. Markedly short, was he not?
A. Yes, sir.
Q. Something like his son, here?
A. He was larger than his son.
Q. Taller than his son?
A. Taller than his son.
Q. Relative to my height, shorter than I am?
778 A. I should judge so, yes, a little shorter than you.

(Redirect:)

Q. Was he as fleshy as Mr. Voorhees?
A. A little fleshier.

(Excused.)

G. R. IDE, a witness called on behalf of defendant, being first duly sworn, testified as follows:

Direct examination.

(By Mr. THOMPSON:)

Q. State your name to the jury.
A. G. R. Ide.
Q. What is your official position?
A. Deputy United States marshal.
Q. Of this court?
A. Of this district, yes, sir.
Q. I will ask you to examine this return and see if you know who made it?
A. Yes, sir.
Q. Who made it?
A. H. W. Tyler, deputy marshal at Seattle.
Q. Deputy marshal of what court?
A. Of this court.

MR. C. S. VOORHEES: I object as incompetent, irrelevant, and immaterial, and for the reason it has not been properly identified.

Mr. THOMPSON: A trial in this court, and it is a part of the records in this cause.

The COURT: What is it you are trying to prove?

779 Mr. THOMPSON: The absence of a witness named in there who was brakeman.

The COURT: That was the other brakeman?

Mr. THOMPSON: The other brakeman; yes, sir.

(Objection overruled; plaintiffs allowed an exception.)

(Excused.)

DEFENDANT'S EXHIBIT No. 3. E. J. Lake, Stenographer.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, District of Washington.

LOUISE H. ADAMS and FRANK H. ADAMS
vs.
NORTHERN PACIFIC RAILWAY COMPANY.

The President of the United States of America to J. A. Adams, of Seattle, Washington, Greeting:

You are hereby required, that all and singular business and excuses being set aside, you appear and attend before the circuit court of the United States, of the ninth judicial circuit, in and for the district of Washington, to be held at the courthouse of said court, in the city of Spokane, county of Spokane, State of Washington, on the 3d day of December, A. D. 1900, at 2 o'clock p. m., then and

780 there to testify in the above-named case, now pending in said court, on the part of the above-named defendant.

And for a failure to attend as above required, you will be deemed guilty of contempt of court, and liable to pay to the party aggrieved all loss and damages sustained thereby.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States and the seal of said court, this 1st day of December, in the year of our Lord one thousand nine hundred and of our Independence the 125th.

[SEAL.] A. REEVES AYRES, *Clerk*,
By JAMES O. O'NEILL,
Deputy Clerk.

Marshal's Return.

I hereby certify that I received the within writ on the 3d day of December, 1900; that I have not been able to find the within named J. A. Adams in the district, this 3d day of December, A. D. 1900.

C. W. IDE,
United States Marshal.
H. W. TYLER,
Deputy United States Marshal.

(Endorsed:) Filed this December, 1st day of, A. D. 1900. A. Reeves Ayres, clerk. By James O'Neill, deputy clerk.

781 (The paper was marked Defendant's Exhibit No. 3, and read in evidence.)

R. C. HUNT, testified as follows:

Direct examination.

(By Mr. THOMPSON:)

Q. What is your name?
A. R. C. Hunt.
Q. Where do you reside?
A. Tacoma, Washington.
Q. What is your occupation?
A. Special agent Northern Pacific railroad.
Q. I will ask you if you are acquainted with a man by the name of J. A. Adams, who was formerly in the service of the Northern Pacific railroad?
A. I have seen him, but I am not acquainted with him.
Q. Did you know what capacity he was at one time working in?
A. Yes, he was a brakeman at one time.
Q. How long has it been since you have seen him?
A. I saw him—oh, it is some little time ago; I can't just exactly remember.
Q. Do you have any knowledge of your own with reference to where he has gone at any time in the past year or more?

Mr. R. H. VOORHEES: I object on the ground it is immaterial.
(Objection overruled. Exception allowed.)

782 A. I have been advised that he is in Alaska, but I don't know of my own knowledge.
Q. You have no knowledge of your own——

Mr. C. S. VOORHEES: I move to strike out the answer on the ground it is hearsay.
(Motion denied. Exception allowed.)

Q. I will ask you to state the fact of what search, if any, you have been required by the defendant in this case to make for that witness, and whether you have made any such search?
A. On Sunday I got orders to see if I could find him; I went to Seattle.
Q. First, I will ask you how did you happen to choose Seattle to search for him?
A. I went up on Howard street and found a sister of his.
Q. Who is that lady?
A. A Mrs. Carter; I don't know any other name, any given name for her.
Q. Finding her, what information did you receive as to where he might be found, if at all?

Mr. C. S. VOORHEES: We object to that as hearsay, to what the woman told him.

(Objection sustained.)

Q. After having seen the sister of this man, what did you do as to looking for him?

A. I took No. 3, Northern Pacific, and went to Seattle, arrived in Seattle the next day about 2 o'clock, or somewhere in that neighborhood

783 Q. Whom did you seek there, what officer of the court, if any one?

A. A Mr. Tyler.

Q. The deputy United States marshal?

A. Yes, sir.

Q. What did you do with reference to assisting in *in* any search for this man?

A. I went around through the town, went to the place where his sister told me he used to board——

Mr. C. S. VOORHEES: I move to strike out what his sister told him.

(Motion denied.)

A. I went to 1012 First avenue and he was not there. I went to the street-car company, where it was said that he had made application, which I found was not so, for employment and I went to several places and several people. I only had a few hours to do it in, therefore I could not make a very close examination.

Q. Who assisted in that search?

A. Mr. Tyler.

Q. I will ask you to state what success you had, if at all, in learning his whereabouts?

A. We did not find him, but I was advised, after leaving Mr. Tyler, that he was in Alaska.

Q. Do you know of your own knowledge where he is?

A. I do not; no, sir.

(Excused.)

784 Thereupon the defendant made the following offer:

"Mr. THOMPSON: I will state to the court that I now hold in my hand the pass over the Northern Pacific Railway Company's line, issued to Mr. Jay H. Adams, on account of his being an attorney for the Spokane Falls & Norther- Railway Company, which pass is between stations west of Helena, Montana, and good until December 31st, 1898, unless otherwise ordered, and numbered 6099.

"It contains, endorsed upon the back, the following printed conditions, headed with the word, 'Conditions,' reading as follows: 'This ticket is not transferable, and if presented by any other person than the individual named thereon, or if any alteration, addition or erasure is made upon it, is forfeited, and the conductor will take it up and collect full fare. The person accepting this free ticket agrees

that the Northern Pacific Railway Company shall not be liable under any circumstances, whether of negligence by agents or otherwise, for any injury to the person, or for any loss or damage to the property of the passenger using the same. I accept the above conditions.' Signed in ink: 'Jay H. Adams.' 'This pass will not be honored unless signed in ink by the person for whom issued.'

"I will state to the court, in making an offer as I do of this pass in evidence, together with the endorsement on the back thereof, that it has been handed to me by counsel for the plaintiff in response to my desire to make this offer and after the service and filing
785 of service and proof of notice which has been heretofore made in this case upon counsel, and which is now on file and of record.

"Mr. R. H. VOORHEES: We object to that, your honor. It is simply the same thing as to state that we have turned over this pass in response to the notice. Those are not the circumstances.

"Mr. THOMPSON: No, I say that it is done after that was done, not in response to it.

"Mr. C. S. VOORHEES: If you say not in response to that after it was served, that is true. We do not produce it in response to the notice at all.

"Mr THOMPSON: It is conceded by counsel in your honor's presence that the signature on the back of the pass, 'Jay H. Adams' is the signature of the decedent, Jay H. Adams, for whose death the action in this case is brought.

"Mr. R. H. VOORHEES: That is right. If this pass is offered, your honor, it should be offered *verbatim ad literatim*.

"Mr. THOMPSON: And printed in large figures upon the back of said pass, '1898.' The letters and figures and matter contained upon the face of said pass being as follows: Upon the upper left-hand corner a circle with the letters 'Northe-n Pacific'; immediately underneath that the words, 'Yellowstone Park Line.' At the top of said pass the words, 'Northern Pacific Railway Company' following, the following words, 'Pass Mr. Jay H. Adams account att'y S. F.
786 & N. R'y., between stations west of Helena, until December 31st, 1898, unless otherwise ordered. No. 6099. C. S. Mellen, president.'

"Mr. R. H. VOORHEES: What is the object of the offer?

"Mr. THOMPSON: I do not think it is necessary to state the object of the offer unless the court requires it.

"The COURT: You had better state what you offer.

"Mr. THOMPSON: I now desire, if your honor please, to offer this pass in evidence; and also to offer in connection therewith and as a part thereof, the printed conditions and stipulations upon the back of said pass, together with the signature thereon, the offer being intended to be the whole pass, with all the conditions, stipulations and endorsements thereon.

"We offer to prove, if your honor please, that the pass which I hold in my hand and which I now offer to introduce in evidence, was the transportation, and the only transportation used by Mr. Adams, the decedent, in his trip from Spokane to Hope and return-

ing from Hope to Spokane on the 13th day of November, 1898, in so far as he rode; that he offered no other transportation, paid no other fare, nor offered to pay any other fare; but this was the transportation upon which he traveled and the only transportation upon which he traveled that day.

"Mr. R. H. VOORHEES: The plaintiff objects to the offer, your honor, as to the pass, and as to the additional proof, first, on the ground that it is incompetent, immaterial, and irrelevant and
787 tends to prove no issue in this case; second, on the ground that the offer itself asserts that, on the 13th day of November, 1898, the deceased, Jay H. Adams, was on defendant's passenger train under and by virtue of transportation issued by the said defendant; third, on the ground that even if carried free of charge, or gratuitously by defendant, it did not deprive the deceased, Jay H. Adams, of any of the rights of a passenger who pays; fourth, on the ground that the conditions on the back of such transportation, if it is sought to bind the deceased, Jay H. Adams, thereby, are void as against public policy, and if it is sought to bind the plaintiffs in this case, Louise H. Adams and Frank H. Adams, thereby, have no binding power upon them, inasmuch as the said conditions show a contract or agreement to which they were not parties, nor either of them; and, fifth, on the ground that the face of the said transportation shows that it was issued for a consideration.

"The COURT: I will sustain the objection on the ground that the evidence offered is not material to any of the issues that are joined between the parties to this case. I do not regard the rights of Mr. Adams as being involved in this trial. You can have the record show that this was offered, and that the objection is taken, the court sustained the objection, and refused to permit you to introduce the evidence."

(Exception allowed on behalf of defendant.)

Whereupon defendant rests.

788 Then came the plaintiff, and on its behalf introduced the following testimony in rebuttal:

Rebuttal.

JUSTIN GILBERT, testified as follows:

Direct examination.

(By Mr. C. S. VOORHEES:)

Q. Mr. Gilbert, you are residing at Spokane?
A. Yes, sir.
Q. And were in April last?
A. Yes, sir.
Q. You are a stenographer and shorthand writer?
A. Yes, sir.
Q. In the month of April last were you acquainted with O. M. Lawrence?

A. I saw him on the witness stand in this court.
Q. Who testified as a witness at the former trial of this cause?
A. Yes, sir.
Q. Did you hear Mr. Lawrence testify at the time?
A. I did.
Q. Did you at that time make any memorandum as to what Mr. Lawrence testified to at that time?
A. I did.
Q. Have you that memorandum with you?
A. Yes, sir.
Q. Can you refer to that memorandum, beginning with the question "Do you know where the train was when you went back into the diner on that trip"?
A. Yes, sir.
789 Q. Will you read from your notes the question: "Do you know where the train was when you went back into the diner on that trip?" Now, read the answer.
A. (Reading.) "Yes, sir, not in the diner; I knew where the train was when I went forward the second time."
Q. Read the next question.
A. (Reading.) "Q. Yes. You certainly went into the diner, and whether you went back to the Pullman or not you don't recollect?"
Q. Read the answer
A. (Reading.) "I don't recollect; but I may have stopped and spoke to the boys in the dining-car."
Q. Now, read the next question.
A. (Reading.) "Q. Now, when delivering that message, you started back toward the front of the train again. Have you any recollection where the train was?"
Q. Now, read the answer.
A. (Reading.) "A. I remember where we was as quick as I stepped out onto the first platform"—I think that word is "open," but I won't swear absolutely; it is not written very plainly.
Q. Read the next question.
A. (Reading.) "Q. The first platform of the tourist-car? A. Yes, sir."
Q. Read the next.
A. (Reading.) "Q. Where was the car then? A. We was just leaving Pack River trestle."
Q. The next question.
790 A. (Reading.) "Going towards Spokane? A. Yes, sir."
"Q. Who, if anyone, did you see on the platform at that time or any place along in the train. A. No one."
"Q. When you went through that platform into the tourist-car, how long did you remain in the tourist-car? A. I passed right directly through it, into the rear end of the day-coach."
Q. The next question.
A. (Reading.) "Q. When you passed through the tourist-car, when you came into the rear end of the day-coach, you passed across the front unvestibuled platform of the tourist-car, did you not? A. Yes, sir."

Mr. THOMPSON: Have you read that just as you have it in your notes?

A. I will read it again. (Reading.) "Q. When you passed through the tourist-car"—I think that is "in order to come into the rear end."

Mr. THOMPSON: Do you know what it is?

A. Well, "in order to come" and "when you come" would be written—there would not be so very much difference, but I think it is "in order to come."

Mr. THOMPSON: It does not appear as either in this copy, but go ahead.

A. (continued). (Reading resumed.) "—into the rear end of the day-coach you passed across the front unvestibuled platform of the tourist-car, did you not? A. Yes, sir."

791 "Q. Where was the train by that time?"

Mr. THOMPSON: Is that the way it reads there, "by that time?"

A. I think so, yes, sir. (Resuming reading.) "Just a little from the end of the trestle, a little past from the end of the trestle this way."

The WITNESS: May I make an explanation, if there are any discrepancies, that this was furnished as daily copy, and I reported the case all along and had no assistance, there was no one available to help me at the time, and I dictated it to two operators, I was dictating on each side, and I did not have time to revise my copy, and of course there might be small errors that crept in in that way.

Q. Now, you may state whether or not from your notes, Mr. Gilbert, Mr. Lawrence testified as you have read on the former trial of this cause.

A. Yes, sir.

(Excused.)

J. L. CARRUTHERS, recalled, testified as follows:

Direct examination.

(By Mr. C. S. VOORHEES:)

Q. Are you acquainted with O. M. Lawrence?

A. Yes, sir.

Q. The brakeman who testified in this case for the defense?

A. Yes, sir.

Q. I will ask you to state whether or not in the hallway, just out of the United States courtroom, during the progress of this

792 trial on the former occasion in April last, you had any conversation with O. M. Lawrence, in which he asked you why you were here?

A. Yes, sir.

Q. You may state whether or not Mr. Lawrence asked you if you were here to testify for the railway company?

A. Yes, sir, he did.

Q. What did you reply to that?

A. I told him that I was here to testify what I knew about it, whether it was for the railroad company or other people it made no difference.

Q. I will ask you whether or not, at that time and place, Mr. Lawrence did not say to you, "If you consider your job worth anything you had better not testify against the railroad," or words to that effect?

A. Yes, sir, he did.

Cross-examination.

(By Mr. THOMPSON:)

Q. Did you and Mr. Lawrence have any difficulty at that time?

A. None to speak of.

Q. Any hard words?

A. No, sir.

Q. No quarrel or anything of that kind? Do you allow a man to talk to you in that way and don't get angry?

A. I considered the source from which it came.

Q. You had had some feeling between you and Mr. Lawrence before, had you not?

A. Not a bit.

Q. It was because it was Lawrence, and not because it was somebody else that you did not get angry?

A. I did get angry, but I did not show it to him.

Q. You did not show it. You say now that you did get angry. Why didn't you report it at that time?

793 A. I did not know it was my duty to report it.

Q. You didn't know that it was your duty to report it?

A. No, sir.

(Excused.)

E. H. WICKERSHAM, recalled in rebuttal, testified as follows:

Direct examination.

(By Mr. C. S. VOORHEES:)

Q. Are you acquainted with O. M. Lawrence, who testified in this case?

A. Yes, sir.

Q. Were you present in the courtroom when I was making the opening statement to the jury as to what would be your testimony in this case?

A. Yes, sir.

Q. Who was sitting with you at the time when that statement was made?

A. I believe Mr. Lawrence.

Q. When I made the statement to the jury as to what would be proved by your testimony, I will ask you whether or not Mr. Law-

rence did not then say to you, "If you make your testimony as strong as that you are liable not to get back on the road," or words to that effect?

A. Yes, sir, he did.

Cross-examination.

(By Mr. THOMPSON:)

Q. You and Mr. Lawrence are acquaintances?

A. Yes, sir.

Q. How long have you known each other?

794 A. Four or five years.

Q. Ever have any difficulty?

A. No, sir.

Q. Always been good friends?

A. Yes, sir; always been good friends.

Q. Were you telling Lawrence you were trying to get back on the road?

A. No, sir.

Q. No suggestion to him that you were trying to get back on the road?

A. I have not been off of the road, only just on a vacation.

Q. Just took a vacation?

A. Yes, sir.

Q. Did Lawrence know that?

A. Yes, sir.

Q. He knows that you are simply off on a vacation?

A. Yes, sir.

Q. He knew you were not making any application to try to get back on the road, didn't he?

A. I don't know whether he did or not.

Q. He knew as a matter of fact you were still on the road, didn't he?

A. He knew that I was not working just at the present time.

Q. Had not been for several weeks?

A. Yes, sir.

Q. Now, just state to the jury what the conversation was between you and Mr. Lawrence and how it came about; tell it yourself in your own way; look at the jury, please, while you are telling this.

A. We were just talking over what Mr. Voorhees had said in his talk to the jury, just talking it over.

Q. You and he were talking it over.

795 A. Yes, sir.

Q. And at the time Mr. Voorhees was making the statement that you got seasick on account of the motion of the train?

A. Yes, sir.

Q. Or was it what you said about witness Adams that Mr. Voorhees was talking about?

A. He thought that I made my statement too strong.

Q. That you did or Mr. Voorhees did?

A. That I had.

Q. Had you made any statements?
A. I had talked it over with Mr. Voorhees?
Q. You had talked it over with Mr. Voorhees?
A. Yes, sir.
Q. Did you tell him in that conversation that you had talked it over with Mr. Voorhees?
A. I believe so, I am not sure.
Q. You and he had quite a conversation about it, didn't you?
A. Just for a short time; yes, sir.
Q. Did you talk to him about what you had claimed that the witness Adams had said; didn't you tell him about that at that time?
A. I don't remember we did just at that time; we had talked it over.
Q. You had talked it over before?
A. Yes, previous to this time.
Q. And you told him that you were going to say that Adams had told you that?
A. No, sir.
Q. You didn't tell him anything about it?
A. No, sir, I had not said to him——

796 Mr. R. H. VOORHEES: I object. Counsel is cross-examining the witness about a prior conversation to the present one.
The COURT: The objection is overruled. You can cross-examine and find out whether it is the same conversation or another one.

Q. Now, had you in this conversation with him told him anything about what you stated on the stand about this witness Adams having made a declaration on the train to you?
A. Yes, I think I had; yes, sir.
Q. Now, in that conversation he told you that if you made such a statement as that about Adams you were liable to not get back on the train; did he tell you that?
A. He did not mention Adams' name.
Q. He did not mention anything at all?
A. Yes, sir; but he did not mention Adams' name.
Q. What was the statement in reference to the speed of the train?
A. It was in regard to my testimony, what I said in regard to that trip, making that trip.
Q. You were not working for the railway company, at all, were you?
A. No, sir; I was working for the Northern News Company.
Q. The railway company had no power over you, had it, in any way?
A. No, sir.

(Excused.)

JOHN A. PIERCE, recalled in rebuttal, testified as follows:

797 Direct examination.

(By Mr. C. S. VOORHEES:)

Q. Mr. Pierce, you testified on your former direct examination in this case that you returned to Spokane on the 14th with the body of Jay H. Adams after it was found out this side of Hope?

A. Yes, sir, returned to Spokane.

Q. Where, if any place, did you go on the 15th?

A. I took the east-bound overland train on the morning of the 15th, going east.

Q. On the morning of the 15th, what time did you leave Spokane?

A. I think the train left at 7 o'clock, or a few minutes after 7.

Q. What was the character of the weather that morning, Mr. Pierce?

A. Just before I boarded the train it began to snow very violently.

Q. For how long a time did that snowstorm continue?

A. It continued all of the day, my recollection is. I went to Butte, and there was a very heavy snowfall there. I think it had snowed more or less all day.

Q. Do you recall that morning passing the point at which you had the day before found the body of Jay H. Adams?

A. Yes, sir, I watched for the point.

Q. State what is the fact as to whether or not at the time you passed that point it was snowing or otherwise.

A. It was snowing; yes, sir.

798 Q. What was the character of the storm at the point where the body had been found, as you saw it on the 15th, compared to its violence when you left Spokane?

A. My recollection is that the nearer we reached the summit the harder the storm became.

Q. At the point at which Mr. Adams' body had been found, and which you passed on the 15th, state whether or not you noticed on the morning of the 15th when you passed there there was snow on the ground or otherwise?

A. There was. That was the first snow storm of the season, and I could not tell you how great or how little the fall was there that was remaining on the ground. We were going at the usual rate of speed along there.

Q. Do you remember about the time you reached that point on the morning of the 15th?

A. No, I did not look at the time; I should judge it was in the neighborhood of two hours after leaving Spokane.

Q. And what was the fact as to whether or not it was snowing at that point when you reached there?

A. Yes, sir; it was snowing from the time I left Spokane.

(Excused.)

(Thereupon the following proceedings were had:)

Mr. THOMPSON: It has been agreed between Mr. Voorhees and

myself that the large map which has been referred to by the various witnesses may be received in evidence and marked as an exhibit.

799 The COURT: Very well.

(The same is marked Defendant's Exhibit "A 3.")

(Whereupon the testimony was closed.)

The foregoing constitutes all the testimony and a statement of all the evidence introduced upon the trial, and all of the exhibits except those which it is impossible to print, which latter exhibits will be sent up by special order of the court to be made hereafter.

And thereupon the defendant, by its counsel, moved the court, in writing to charge and instruct the jury, and in the following words, to wit:

1. GENTLEMEN OF THE JURY: I instruct you that, under the law and the evidence in this case, it is your duty to return a verdict for the defendant.

2. I instruct you, gentlemen of the jury, that, upon the evidence given in this case, the plaintiffs cannot recover for the death of Jay H. Adams, unless under the evidence given in this case, Jay H. Adams could himself have recovered damages in the cause, had he been injured only, and was bringing the action in his own name, for his own injury. In other words, had Jay H. Adams been injured only, by reason of whatever accident or circumstances caused his death, and he should have brought an action against the defendant for the purpose of recovering damages for that injury, and the evidence in the case tending to show how he was injured had been precisely the same with reference to the accident as it has been in this case, then if under such circumstances you should find that

800 Mr. Adams was not entitled to recover, you would not be justified in returning a verdict for the plaintiffs in this cause.

Whereupon counsel for the respective parties addressed the jury in behalf of their respective clients.

And thereupon the court charged the jury, and instructed them as follows:

Instructions to the Jury.

GENTLEMEN OF THE JURY: This case will now be submitted to you for your decision, and in view of the importance of the case to the parties and the burden of a trial of the case and the fact that it has been once tried without a jury being able to render a verdict, I want to express the hope that you will be able to overcome all difficulties that may stand in your way of coming to an agreement, and that you will render a decision in accordance with the right of the matter for or against the plaintiffs.

(2.) We have endeavored so far to give the parties to this case as fair a trial as it is possible. Ample time has been allowed for the presentation of all the evidence obtainable material to the issues, and the attorneys representing the parties have been diligent and

able in the presentation to you of the testimony; they have also argued the case with zeal and ability on both sides. It is proper for you to give due consideration to the testimony as a whole, and to every part of it, with the object of trying to determine the facts in the case in accordance with the truth, as far as you can ascertain it from the testimony; and to give due consideration also to the
801 arguments of counsel, as far as they present to your minds the reason of the case, so as to lead you to a correct conclusion in rendering a decision for or against these plaintiffs.

(3.) I will endeavor to outline to you the issues in the case—and by that I mean the questions which you are called upon to decide—and to state the principles of law which must control your decision. It is important that you should first understand the nature of the case, because upon that groundwork the superstructure is builded, and you must understand the principles which govern the case.

(4.) In our system of jurisprudence civil actions are classified into actions which are termed *ex contractu*, those arising out of a contract, a promise or an agreement, belong to this class of actions. Actions *ex delicto* are cases founded upon torts. A tort is a wrong committed, resulting in injury, for which the law imposes the liability upon the wrongdoer to render compensation to the injured party. Now, this case belongs to the latter classification.

(5.) It is an action of tort; a wrong is charged against the defendant in the case toward the plaintiffs, causing them injury of a pecuniary nature, entitling them to compensation in money to make good, as far as it is possible, the loss which they have sustained of a pecuniary character. It is not practicable to take cognizance in a court of justice of those injuries which are sentimental and affect the feelings and sentiments, but the law endeavors to give just compensation for an injury of a pecuniary nature. So you will
802 regard this case as one in which the rights of the plaintiffs depend upon the truth of the charge which they make against the defendant, of having committed a wrong toward them which resulted in an injury to them of a pecuniary nature.

(6.) The plaintiffs do not base their demand upon any contract. On the contrary they complain of a wrong which resulted in an injury to them by depriving them of the support, protection, society and comfort of their husband and father. Their case rests upon the same legal grounds as it would if Mr. Adams, without being a passenger upon the defendant's train, and without holding any contractual relation whatever with the defendant, had been killed by the wrongful act of the defendant. Their right to maintain this action—assuming that the charge which they make against the defendant is true, and supported by evidence—is a right given to them by the statutes of this State in which the case is being tried, and by the statutes of the State of Idaho, where the injury occurred. The statutes of Idaho are similar to the statutes of this State, in providing that when the death of a person is caused by the wrongful act or negligence of another, his heirs or personal representatives may maintain an action for damages against the person causing the death. And in every such action the jury may give such damages,

pecuniary or exemplary, as under all the circumstances of the case may to them seem just.

(7.) Under this law the plaintiffs have a right of action to recover compensation for their own loss, and they are not suing to enforce a right of the deceased to recover damages fo- the injuries which he suffered.

803 (8.) The rights of the parties which they contend for are stated by them in their pleadings. On the part of the plaintiffs their complaint contains a statement of the facts which they claim constitute their right of action, and by which they have endeavored to bring themselves within the purview of these statutes.

(9.) This complaint is partly admitted by the defendant and partly denied. All of the parts of the complaint which are admitted are to be taken by you without any evidence, as being true. The facts alleged by the plaintiffs which are denied in the answer are disputed facts, and are to be decided by the jury according to the preponderance of the evidence admitted upon the trial.

(10.) The answer, in addition to denying the plaintiffs' allegations, sets forth in an affirmative way matter which the defendant claims constitutes a legal defense. All of these allegations which are denied in the reply of the plaintiffs are also disputed facts which the jury must take notice of, and which you are called upon to decide in accordance with the preponderan-e of the evidence admitted on the trial.

(11.) The first, second, third, fourth, and twelfth paragraphs of this complaint are expressly admitted by the answer. They are formal matters necessary to the case. They allege that the plaintiff, Louise H. Adams, was the wife, and Frank H. Adams the son of Jay H. Adams, deceased; that they are the only heirs of said deceased; that they are citizens of the State of Washington; that the defendant is a corporation organized and existing under the laws of the State of Wisconsin, and that during the times

804 covered by the allegations of the complaint this defendant was operating a railway between Lake Superior and Puget sound, through and across the State of Idaho. The twelfth paragraph, which is admitted, states that on the 13th day of November, 1898, and a very few moments after said train left the town of Hope, and while said defendant's train was running toward the next station on said road, the said deceased left the smoking-car to visit the dining-car fo. the purpose of purchasing cigars, which were kept in said car for sale to passengers on said train of said defendant company.

(12.) In addition to the facts alleged in the complaint and admitted by the answer, there are certain other facts which are established in this case beyond any question, and I have a right to mention them to you as facts in the case about which you will not have to struggle with the testimony to reach an agreement. These facts are, that the deceased, Jay H. Adams, was, on the 13th day of November, 1898, a passenger on the train of the defendant company, he having entered said train at the station at Hope on the line of the road in Idaho, and that he was destined for Spokane; that

during the run of the train between these two stations Mr. Adams was killed by violent means. I will also say to you that there is no conflict in the testimony as to the makeup of the train; this train did have an unvestibuled tourist car as one of the cars in that train, and Mr. Adams did pass while the train was in motion over the platforms of that car.

(13.) The controverted allegations of this complaint are found in the other paragraphs. They allege, in substance, that while
805 Mr. Adams was a passenger on the train, the train was operated so negligently and carelessly as to cause the death of Mr. Adams; that it was the custom of the defendant company to have attached to its passenger trains, dining-cars in which cigars and meals were sold and served, and that passengers were permitted to go from the other cars while the train was in motion, into the dining-car for the purpose of buying cigars and obtaining refreshments; that at the time of this occurrence there was known and was in practical use appliances in the makeup of trains called vestibuling of cars—that is, the inclosure of the platforms of the different cars so as to make a completely inclosed passageway across the platforms from one car to the connecting car; that the defendant company had made it known by advertisements that its passenger trains were vestibuled trains, and this complaint alleges that this train was vestibuled with the exception of one car; that the defendant took a seat in the smoking-car, which was in the forward part of the train, and this next twelfth paragraph is the one admitted, which is that he went from the smoking-car to the dining-car to purchase a cigar. And the thirteenth paragraph alleges that, having purchased said cigars the deceased left the dining-car for the purpose of returning to the smoking-car; and while passing over one of said unguarded and unvestibuled platforms, through and because of the negligence of the defendant company in leaving the platforms of said car in said train unvestibuled and unguarded, by the movements of the train, the deceased was thrown from the train and killed.

806 (14.) The fourteenth paragraph states that the defendant company carelessly and negligently left an opening at the side of the platform of one of the cars of said train, used for entrance and exit, unguarded while said train was in motion, and that while passing over said platform as aforesaid, through and because of the defendant company's failure to guard said opening, deceased was precipitated through said unguarded opening by the movements of said train, and killed.

(15.) Fifteenth. That at the time and place of said injury to deceased, said defendant company was running its said train at a high and dangerous rate of speed, and that, through and because of the negligence of said defendant company in so running its said train at a high and dangerous rate of speed, said deceased was thrown from said train and killed.

(16.) Sixteenth. That at a short distance from the said town of Hope, there was a sharp curve in said defendant company's track over which said train had to pass, and that said defendant company ran its train around said sharp curve at a high and dangerous rate

of speed, and that, through and because of defendant company's negligence in so running its said train around said curve, deceased was, at said curve, thrown from said train and killed.

(17.) The seventeenth paragraph alleges that the plaintiffs, because of the negligence of the defendant in causing the death of Mr. Adams, have been compelled to expend four hundred and twenty-four dollars for expenses in the interment of the body.

807 (18.) The eighteenth paragraph alleges that Mr. Adams was a lawyer of good habits and good ability, and capable of earning a large income, and that he was a prudent, kind, and affectionate husband and father, and plaintiffs were dependent upon him for support and maintenance And it goes on to allege the fact about the plaintiff, Frank H. Adams, being in college, being supported and educated by his father, and what his prospects were for the future.

(19.) Now, some of these matters that are alleged in these different paragraphs are admitted by the answer, but the issue is made by the denials upon these questions. The charge of negligence is combatted by the answer; it is denied that there was any negligence upon the part of the company in having an unvestibuled car upon that train; it is denied that there was an negligence in leaving the platforms unguarded; it is denied that they were unguarded; that there was any negligence in leaving them uninclosed—that is completely uninclosed. It is denied that there was any negligence in the operation of the train which endangered the safety of passengers. It is denied that the train was run at a high and dangerous rate of speed. It is denied that the train was run around the curve at such a rate of speed as to endanger the passengers, although it is admitted that the curve is there.

(20.) The principal disputed questions are: First, was the use of the unvestibuled tourist-car in the makeup of this train under the circumstances a breach of duty on the part of the defendant,

808 to so make up its trains and keep them as to make them safe for passengers to travel upon—that is, was there any negligence upon the part of the company in allowing this unvestibuled car to be used? That is one of the disputed questions in this case; it is a question whether there was or was not negligence—that is, failure to observe that degree of care and prudence for the safety of the passengers which it was the duty of the company to provide.

(21.) The question as to what constitutes negligence is sometimes a proper question for the presiding judge in the trial of a case to decide; that is, where the facts presented show that there was negligence so conclusively, so plainly, and so obviously, that it cannot be regarded as a disputed question, then it is for the court to say, without submitting it to the jury, that the act was negligent; or, the contrary, where the evidence is so plain and clear as to be obvious to all persons that the act charged as a negligent act was not negligence, then the court will not submit it to the jury. But, when the circumstances are such that intelligent minds may honestly differ on the question as to whether the act complained of was a proper act or a negligent act, then it becomes a question which must

be submitted to twelve men for them to decide whether the act was negligent or not.

(22.) Now, I submit this question to you as a question of that kind, as a question that is disputed between these parties, and your judgment is appealed to to say whether it was negligence or not upon the part of the defendant company to have that unvestibuled car in that train, without railings, rods, chains or gates, to enclose the platforms.

809 (23.) As to the rate of speed that the train was going at the particular time of the injury suffered by Mr. Adams, there is a conflict in the testimony; it is for you to determine what the truth is in regard to the rate of speed that the train was going; and also to determine the question of whether there was negligence upon the part of the men running that train, in running the train at whatever speed it was going as you find from the evidence.

(24.) These are material questions, and they are to be decided by the jury. They are matters alleged in the pleadings necessary to the case, and therefore the burden of proof rests upon the plaintiffs to establish negligence in these particulars, in order to enable them to recover. And it is for you to consider the evidence as a whole, and every part of it, and determine what the facts are, and whether there was negligence or not. And in reaching that determination you are to be governed by the principle that the party having the affirmative must establish by at least a fair preponderance of the evidence the charges which are made. If there is not such a preponderance in favor of the plaintiffs in these particulars, then you are to determine those facts in favor of the defendant.

(25.) The denials in the answer make a square issue as to what was the cause of Mr. Adams' death. These acts charged as negligence, if proved to be negligence on the part of the defendant, do not entitle the plaintiffs to recover damages in this case, unless those acts of negligence were the cause of Mr. Adams' death, because in his death they claim to have suffered the injury. To entitle the

810 plaintiffs to recover damages in an action of tort there must be a wrong, and an injury, and they must concert, so that the injury is ascertained to be the result of the wrong.

(26.) You are therefore to consider all of the testimony as a whole and every part of it, and endeavor the best you can to determine what the fact is as to what caused Mr. Adams' death. If you find that he was thrown or hurled or precipitated from a platform of the car by a force which he could not resist, which was due to the lack of care for the safety of passengers upon the part of the defendant company, either in having an uninclosed platform in that train, or in operating the train so rapidly around a curve in the road as to amount to negligence, and that that was the cause of Mr. Adams' death—then the plaintiffs have made a *prima facie* case entitling them to such damages as the jury may award, unless the jury find that the affirmative defense has been established by a fair preponderance of the evidence.

(27.) If, after a full, careful, and candid consideration of all the evidence showing the circumstances, the question as to how Mr.

Adams happened to fall, or was thrown or was hurled from that train, or how he happened to be bruised and injured and killed, as his mangled body indicated, remains unsolved in your minds, you will have no right to render a verdict against this defendant; to entitle the plaintiffs to recover damages it is necessary that their case be proved as to this important particular. The burden rests upon them to prove that the cause of Mr. Adams' death was a wrongful act of the defendant.

811 (28.) In the determination of the question of negligence, while it is a question for the jury to decide whether there was negligence or not, you are to be controlled in your decision of these questions, by this principal of the law that negligence to create a liabilty on the part of parties in fault, must be a failure to observe the degree of care and prudence that is demanded in the discharge of the duty which the person charged with the negligence owed under the peculiar circumstances of the case to the injured party. And it is necessary for me to state in this connection what was the duty of the defendant as a carrier of passengers.

(29.) The defendant is admitted to be a common carrier of passengers, operating a railroad train for the purpose of carrying passengers, inviting the public to patronize their line of road, and undertaking and being required by the law to provide trains of cars to carry passengers, completely equipped with all that is necessary to make their cars strong and safe for passengers to ride upon, and to have their trains fully manned with competent servants to operate the engine and the brakes, and all the means and appliances for running the train with safety to *be* passengers. The carrier is required by the law to be diligent and to exert the highest degree of care and skill for the safety of the passengers who travel upon its line of road. The law imposes upon the carrier a duty as a public servant to do this. It is a duty which the carrier owes to the public in general, and to each member of the community who has occasion to require its services. The duty which the carrier

812 in this case owed is to be considered with reference to the situation of the plaintiffs. You are not to consider what was the duty of this carrier toward Mr. Adams who was killed, but the duty which the defendant owed to these plaintiffs; and the duty which they have the right to exact from the defendant in this case is the same duty which the defendant company owed to the public in general--and that is the duty to operate the cars and trains fully and completely equipped with whatever is known to be in use and serviceable and suitable and obtainable and proper in the way of equipage of a railroad for carrying passengers safely; and to employ only, in the operation of those trains, servants who are competent to handle the trains with the greatest degree of skill. It is not for me to say as a matter of law that at the time this train was operated, that the complete vestibuling of all the cars in the makeup of the passenger train was a duty of the defendant. I do say that it is the *the* duty of the defendant to be diligent and to exercise prudence and a high degree of care to make that train safe. And it is for you to say, by applying this general principle to the

peculiar facts and circumstances of this case, whether there was a breach of that duty in having in this train an unvestibuled car, without a complete enclosure of its platforms by rods, chains, or gates.

(30.) If you should decide these disputed questions, that I have indicated, in favor of the plaintiffs in this case, you will still have to consider, before you could render a verdict for the plaintiffs, the issues that are raised by the affirmative part of this answer. The substance of this affirmative defense is, that Mr. Adams him-
813 self was negligent; and that his death was caused by an accident resulting from his own carelessness for his own safety. Now, if you should find that this charge is true, then the plaintiffs will be barred from recovering damages in this case, even though you should find in their favor on the other issues that I have indicated. Where a personal injury results from the negligence of the injured party, and also the negligence of some one else, the law will not divide the responsibility, but leaves the injury uncompensated, because the injured party was himself a contributor to the cause of his injury. That principle would bar these plaintiffs from recovering damages, the same as it would bar Mr. Adams himself if he had survived and were suing to recover damages for injuries to himself. This charge of contributory negligence is made affirmatively on the part of the defendant, and therefore to affect your decision it must be established by the defendant by at least a fair preponderance of the evidence.

(31.) All of these pleadings will be placed in charge of the jury; therefore, I want to tell you that following this first affirmative defense there is set out in the answer another affirmative defense which you are not to consider at all, because the court has decided that it is not a bar, even if what is said there be true; it is not a bar to the recovery of damages by these plaintiffs, if the other facts which they allege have been proven; that is, the part of the answer which states that Mr. Adams was a passenger riding upon a free pass containing a contract by which he agreed to exempt the company from any liability for any injury which might result to him while travel-
814 ing on trains caused by the negligence of servants and employees of the road. That is entirely eliminated from your consideration, because the court has decided that Mr. Adams' contract could only affect his own right, and would not operate to deprive the plaintiffs of a right to recover for their injury. Their injury is different from his. They are not seeking to recover anything for the physical pain which he suffered, but they are complaining of an injury to them in being deprived of his support, and the pecuniary benefit which his life was to them.

(32.) You are instructed that it is admitted that the plaintiffs are the sole heirs of the deceased, and they are the parties who are interested in the life of the deceased. They are interested in the future accumulations which he might have added to his estate, and which might thereafter have descended to them, and if you shall find for the plaintiffs, it is proper, in estimating damages, to consider any evidence before you tending to show that there would probably have

been such future accumulations by deceased, and the reasonable probability of the descent thereof to plaintiffs.

(33.) The court instructs you that in cases of this character there is no fixed measure of damages, and no artificial rule by which the damages in a given case can be computed; and if you should find for the plaintiffs, or either of them, the amount of damages must be determined by your sound sense and good judgment, and as under all of the circumstances of the case shall to you seem just.

815 (34.) You are instructed that the law, out of regard to the instinct of self-preservation, will presume, *prima facie*, that a passenger who has suffered death by a railroad accident, was, at the time of the accident, in the exercise of due care; ond this presumption is not overthrown by the mere fact of the injury. In absence, therefore, of an eyewitness, it will be presumed, unless it is shown to the contrary, that at the time of the accident, the deceased, Jay H. Adams, was in the exercise of due care, the plaintiffs in this action are entitled to invoke the aid of the legal presumption of due care upon the part of the deceased, and the defendant corporation has the burden to overthrow such presumption by evidence sufficient to do so, and this burden is not sustained by the production of evidence which leaves the question of contributory negligence in doubt, and such presumption can only be overthrown by a preponderance of the evidence.

(35.) You are instructed that while the degree of care demanded on the part of a railway passenger carrier is the highest degree of care, because of the dangerous and powerful agency of steam employed by such carrier, through which, slight negligence is liable to cause injury to passengers, the degree of care demanded on the part of the passenger is only ordinary care, and ordinary care is what a reasonably prudent man would have done under similar circumstances to those surrounding such passenger.

(36.) Now, referring to the presumption which I have mentioned, to be fair I will say that while the law does out of regard to
816 the instinct of self-preservation indulge this presumption of due care on the part of a person for his own safety, there is also a presumption of due care on the part of a defendant charged with a negligent act causing the death of a person, because it is also a law of nature that human beings will not wantonly or intentionally inflict injury npon others without cause or provocation, and that men placed in positions of responsibility will do their duty toward their fellow-men. Now, it is not for me to say whether one presumption is as strong as the other, but they both rest upon the principles of what we call the law of nature; and this law comes in here to entitle the defendant also to the benefit of the presumption of due care upon the part of its servants in the makeup of the train, and in the operation of the train, that they did use their best judgment and their best skill in making the passenger train safe, and in operating it so that it would be safe for the passengers. But these presumptions gentlemen of the jury, are not controlling. They have to give way to facts shown by evidence; and it is for you to take into account all the circumstances which are shown by the evidence in this

case, and for you to say whether the presumption in favor of one or the other, or both, is a reasonable presumption to have effect in controlling your decision in this case.

(37.) You are instructed that plaintiffs are not bound to establish all of the different acts of negligence set forth in their complaint. If they establish any one or more of such acts of negligence by a preponderance of the evidence in the case, and you shall further find
817 from the evidence that the death of Jay H. Adams was caused by such act or acts of negligence so established, then the plaintiffs are entitled to recover, unless you also find that the deceased was guilty of negligence, and that such negligence of the deceased contributed to and was a cause of his death.

(38.) You are instructed that if you find for the plaintiffs, or either of them, you will allow them, or either of them, such damages as you deem to be reasonably sufficient to make good to the plaintiffs, or either of them, the pecuniary loss to them, or either of them, occasioned by the death of Jay H. Adams. This pecuniary loss is not limited to a present money loss, but in determining it you may consider any evidence before you tending to show what was the reasonable expectation of pecuniary benefits to the plaintiffs, or either of them, from a continuance of his life. By pecuniary benefits is meant any benefits having a pecuniary or money value. The age of deceased, his health, his habits of industry, his accustomed earnings, his capacity for business, his standing in his profession, the size of his practice, and the like, as far as they appear in evidence, are proper to be considered. It is also proper to consider the reasonable expectation of life of the deceased and of the plaintiff, Louise H. Adams, in determining the probable duration of the receipt by her of pecuniary benefit, if you should find she would have received any, from the continuance of the life of the deceased.

(39.) In this connection I will say to you that according to the tables showing the average duration of human life, Mr. Adams'
818 expectancy at the time of his death was a fraction over twenty years; and at that time Mrs. Adams' expectancy—that is, the probability of the length of her life from that time—would be a fraction less than twenty-one years.

(40.) You are instructed that it is not necessary, to enable the plaintiff, Frank H. Adams, to recover, that he had a legal claim on the deceased for any of the pecuniary benefits claimed by him to be lost by him because of the death of Jay H. Adams, nor is the majority of said plaintiff, Frank H. Adams, a bar to such recovery.

(41.) If you should find that the deceased went to the dining-car by the invitation, expressed or implied of the defendant, then the deceased had a right to assume that the defendant would run its train with regard to the actual condition in which it was in such a way as would make the passage to such dining-car safe.

(42.) The theory upon which the plaintiffs seek to recover damages against the defendant corporation is that the corporation has been guilty of negligence, which negligence caused the death of Jay H. Adams, the husband of one of the plaintiffs, and the father of the other plaintiff. I instruct you that negligence is the failure

to exercise the proper degree of care; and unless you find in this case that there was some carelessness or some negligence upon the part of the defendant railway company which was the operative or proximate cause of the death of Jay H. Adams, then neither of the plaintiffs can recover in any event.

(43.) I further instruct you that a person riding upon a
819 railway train, who is furnished by the railway company with a safe car in which to ride and a safe seat in which to sit, is bound to use ordinary care and diligence in all his movements and conduct while on the train to protect himself from any accident or injury. By ordinary care, I mean such care and diligence as an ordinarily prudent man under all circumstances with which he is surrounded would exercise under the circumstances. If such a person so riding upon a railway train, and being in a safe car and safe seat furnished him, should voluntarily attempt to pass from one moving car to another while the train was in rapid motion, it would be his duty in passing across the platforms of such cars to use such care and prudence as an ordinarily prudent and careful man would exercise under the circumstances. And if by reason of his failure to use such care and prudence he should be precipitated from the platform of the cars and killed, there would be no right of action whatever in favor of any one against the railway company on account of his death.

(44.) I further instruct you that if you should find in this case that the railway company defendant was running upon its train upon which the decedent, Jay H. Adams, was riding at the time he came to his death, an unvestibuled tourist sleeping-car, which was placed between a vestibuled car upon which the deceased was riding and the dining-car attached to said train, and the deceased voluntarily, and while the train was in motion, and for the purpose of procuring cigars, passed out of a safe car and place where he was riding across the unvestibuled platform of such tourist-car, he was
bound in so doing to exercise such care as an ordinarily pru-
820 dent and careful person would feel bound to exercise in order to make his passage across such unvestibuled platform a safe passage; and if you should find from the testimony in this case that the deceased came to his death by reason of falling or being thrown from any unvestibuled platform, and that he would not have so fallen had he exercised such prudence and diligence as an ordinarily prudent and careful person under such circumstances would feel bound to exercise, then and in that event there can be no recovery in this case upon the part of the plaintiffs, or either of them.

(45.) The uninclosed condition of the platform at each end of the tourist-car being obvious, that is, plainly visible to any person of ordinary intelligence in the possession of his faculties, Mr. Adams must be presumed to have known that it was not vestibuled, and to have acted with perfect knowledge of the fact.

(46.) If the decedent, Jay H. Adams, had actually learned from past experience of his own, or in any other way, that the defendant railway company by its practice or custom, permitted persons riding in the cars of such company to travel through the train while it was

in motion, for the purpose of entering the dining-car in order to procure cigars or other commodities, he would be entitled to act upon that knowledge. But the knowledge of such custom or practice would not justify him in a failure to use his senses and to act as an ordinarily careful and prudent person; and if he had knowledge or information at the time, gathered either from his past experi-
821 ence in traveling upon the trains of the defendant company, or from any other source, that in making such trip from the dining-car he might probably pass over unvestibuled platforms, it would be his duty to look out for such unvestibuled platforms, and any failure on his part to exercise reasonable and ordinary care in that respect would be negligence. And although you might find that the railway company was itself also negligent, yet if the negligence of Mr. Adams and the negligence of the company combined to produce an accident by which he came to his death, then there could be no recovery upon the part of the plaintiffs in this case, or either of them.

(47.) In determining the cause of the death of Jay H. Adams, you must depend upon the evidence in the cause and not upon either surmise or guess. The plaintiffs must prove a case against the company, and the evidence must show to your minds what it was that caused the death of the decedent. If it should be true that you are not able from the evidence to determine whether he came to his death because of some negligence of the railway company, or whether he came to his death because of some negligence of his own, or whether he came to his death by some mere accident, without any negligence of his own, or any negligence of the company, or whether he came to his death because of some cause outside of any action of the defendant or of Mr. Adams himself, you would not be justified in finding any verdict for the plaintiffs. You are not bound to solve the question as to how he came to his death, if the evidence does not furnish you a means of solving it; and in such a case, if you
822 cannot from the evidence solve the question as to how he came to his death, it will be your duty to return a verdict for the defendant.

(48.) You are the exclusive judges of every question of fact in the case. You are to decide what the facts are from the testimony admitted upon the trial. You are the judges of the credibility of the witnesses; that is, it is for you to determine in your own minds whether to accept as true the testimony that has been given, or any part of it.

(49.) You should treat all witnesses fairly. It is proper to assume that they have told the truth as near as they are able from their knowledge and the condition of their memory, their ability to remember, and to express themselves with accuracy; and so far as their testimony can be harmonized throughout, it is to be taken as true, and you are to endeavor to harmonize it. But when you come to a point where there is an irreconcilable conflict in the testimony of the witnesses, then you have to weigh the testimony and determine its value on either side. Where there is such conflict, and you are weighing the evidence, you will be governed by the rules of

common sense, the rules which you as men of experience in the affairs of life would apply in endeavoring to candidly ascertain a fact from evidence in a matter of like importance in your own affairs. Jurymen are not supposed to act upon any fantastical theory in deciding questions for other people which would not be tolerated in the determination of the truth of a matter which affected themselves, or affected their conduct outside of the jury room. You are to take into account all that appears in regard to each witness, who
823 he is, what his character is, his manner of giving his testimony, whether he appears to be candid and frank, or whether he shows an interest to try to argue the case and to influence the decision of the jury to come to his way of thinking about it, and those things which appear in the manner of giving the testimony and in the character of the witness, everything that comes out should be taken into account in judging of the credibility of witnesses.

(50.) In the consideration of disputed testimony, corroboration or lack of corroboration in particulars wherein it should be corroborated if true, should be noted and due allowance made.

(51.) The number of witnesses testifying on each side of a controversy to any fact is to be taken into account, although it is not controlling. To illustrate my meaning as to this point about the number of witnesses, suppose that five witnesses swear that a thing is so, and three witnesses say it is not so, there is five to three; the three may be right, and instead of simply counting the numbers it would be the duty of the jury to take into account the character, behavior, and intelligence of each of the witnesses and all of the surrounding circumstances, as well as the number of contradicting witnesses, in determining the value of the testimony of the three, as compared with the contradictory testimony of the five.

(52.) If any witness appears to you to have willfully testified falsely in a matter that is material to the case, you have a right to regard him as a discredited witness, and to reject his testimony entirely, except in so far as it may be corroborated by other good evidence in the case.

824 (53.) In determining the weight and value of testimony, you are to give a good deal of consideration to the testimony itself, that is, in the particulars as to its being plausible and probably true, whether it is free from contradictions or otherwise, and the amount of testimony there is against it to contradict it. In short, you will endeavor, according to your best judgment and the light of experience to determine as to the credibility of the witnesses and the weight and value of their testimony in all points where you have to weigh testimony and decide as to the truth or falsity of conflicting statements.

(54.) Now, applying these rules for judging of the testimony, it will be your duty to determine what the facts of this case are, so far as it is shown by the testimony; and from the facts as you find them, to determine whether or not there was negligence on the part of the defendant company in the particulars charged in the complaint; whether that negligence, if you find there was any, caused the death of Mr. Adams; whether Mr. Adams himself was negligent in a man-

ner which contributed to his injury. And when you have decided those questions, you will decide this case for or against the plaintiffs.

(55.) If you come to a conclusion in favor of the plaintiffs, then you have the further duty to assess the damages, governed by the principles which I have already given you, and render a verdict for such sum of money as in your judgment may be a just compensation for the pecuniary loss suffered by each. And if you do find a verdict in favor of the plaintiffs, you will determine how much damages
825 to award Mrs. Adams, and make a separate statement of how much damages you will award to Frank H. Adams.

(56.) I give you a prepared verdict with a slip of paper giving the words to be added to make the verdict conform to your decision. If you find for the plaintiffs your verdict will read: "We, the jury impaneled in the above-entitled cause, find for the plaintiffs, and award as damages to Louise H. Adams"—whatever amount you award to her; and to Frank H. Adams, blank dollars; fill that blank so as to indicate the amount. If you find a verdict in favor of the defendant, you will add to this simply the one word "defendant," so it will read: "We, the jury impaneled in the above-entitled case, find for the defendant," and have it signed by your foreman, and bring it into court as your verdict in the case. I will mark your written requests to instruct as given or refused.

And thereupon, and before the jury retired to the jury-room, the defendant, by its counsel, took exceptions to the instructions given to the jury by the court, and to the action of the court in refusing to give the instructions requested by the defendant, as follows:

Mr. THOMPSON: Defendant excepts to the action of the court in refusing to give instructions numbered one (1) requested by defendant, wherein the court is requested to instruct the jury to return a verdict in favor of defendant, upon the ground that there is no evidence in the case sufficient to support a verdict for the plaintiffs, or to justify the submission of the case to the jury, and no question of fact which the jury are called upon to determine.

826 Defendant excepts to the action of the court in refusing to give defendant's instruction numbered two (2), to the effect that the plaintiffs or either of them cannot recover for the death of Jay H. Adams, unless under the evidence in the case, the deceased, Jay H. Adams, could himself recovered damages in case he had been injured only, and was bringing the action in his own name for such injury.

Defendant desires to except to that portion of the instruction beginning on page No. 2, as given by the court, from the bottom word on said page, the words, "Their case rests upon," etc., following down to the words, "of the defendant" on the fifth line of that instruction. (Paragraph 6 of instruction.)

Defendant also desires to except to the action of the court in giving that portion of the same instruction last referred to, and which appears on page 3, beginning with the words, "Their right to maintain this action," immediately following the words last referred to, down to and including the close of that instruction in the

words, "And in every such action the jury may give such damages, pecuniary or exemplary, as under all the circumstances of the case may to them seem just." (Paragraph 6 of instructions.)

I desire to except to the action of the court in giving that portion of that instruction. I will say frankly to your honor there are some changes in that instruction, but that is the only way I can identify it.

The COURT: Yes, sir, it is here.

Mr. THOMPSON: There are some verbal changes which I have not in here.

827 I desire to except to that instruction which appears on page nine beginning with the words, "Now, I submit this question to you as a question of that kind, as a question that is disputed here between the parties. The circumstances are shown. It is not so plain and obvious," etc., down to the words "defendant company, to have that unvestibuled car in that train." I say again there are some changes in that. (Paragraph No. 22 of instructions.)

The COURT: Yes, sir, some is stricken out and some added.

Mr. THOMPSON: I am just intending to identify that instruction that I except to the action of the court in giving there.

I except to the instruction appearing on page 11 of the numbered pages which begins, "You are therefore to consider all the testimony as a whole, and every part of it," down to and including the close of that instruction on that page with the words, "the cause of Mr. Adams' death was a wrongful act of the defendant." (Paragraphs Nos. 26 and 27 of instructions.)

I desire to except to that part of the instructions given by the court, beginning on page twelve, which instruction begins, "The defendant is admitted to be a common carrier of passengers," or words to that effect in the court's instruction, and especially to that portion of the instruction which the court gives, that "the law imposes upon the carrier a duty as a public servant to do this, it is a duty

828 which the carrier owed to the public in general, and to each member of the community," and it is "the duty which the carrier in this case is to be regarded by you in the light of the situation of the plaintiffs. You are not to consider what was the duty of this carrier toward Mr. Adams who was killed," and following to the close of that instruction the words, "train an unvestibuled car." (Paragraph No. 29 of instructions.) Your honor will permit us an exception to that instruction, to the whole and each and every part of it?

The COURT: Yes, sir.

Mr. THOMPSON: I desire to except to the giving of the instruction and to the whole and every part of it, beginning on page 14, and which I identify by the words, "As these pleadings will be placed in charge of the jury, I want to tell you the following this first affirmative defense there is set out in the answer another affirmative defense," etc., proceeding down to the words on page 15, "and the pecuniary advantage which he was to them." I except to the giving of that instruction at all to the jury. (Paragraph No. 31 of instructions.)

Also to the giving of the instruction on page 15 immediately fol-

lowing, which is, "You are instructed that it is admitted that the plaintiffs are the sole heirs of the deceased, and they are the parties who are interested in the life of the deceased," and then follows that portion of that instruction, the court having grouped the two plaintiffs together. (Paragraph 32 of instruction.)

And I also desire to except to the short instruction immediately following that, in which the court says that there is "no artifi-
829 cial rule by which the damages in a case can be computed," leaving to the jury the determination upon their own sound sense and judgment under all the circumstances of the case what seems to them to be just. (Paragraph 33 of instructions.)

I desire to except to the instruction, and every part of it, in which the court, on page 15, begins the instruction, "out of regard to the instinct of self-preservation," etc., where a passenger has suffered death, as being improper in this particular case, and not fairly stating the law. (Paragraph 34 of instructions.)

Also to that instruction beginning on page 17, "You are instructed that if you find for the plaintiffs, or either of them, you will allow them, or either of them, such damages," etc., extending on to page 18, the words "from the continuance of the life of the deceased." (Paragraph 38 of instructions.)

Also to the instruction appearing on page 18, a short instruction, beginning, "And in this connection I will say to you that according to the tables showing the average duration of human life, etc., down to, "would be a fraction less than twenty-one years." (Paragraph 39 of instructions.)

I specially desire to except to the instruction immediately following, a short instruction: "You are instructed that it is not necessary to enable the plaintiff, Frank H. Adams, to recover that he had a legal claim on the deceased," and closing with the words, "Frank H. Adams, a bar to such recovery." (Paragraph 40 of instructions.)

I think that is all, if your honor please, I desire to except to the action of the court.

830 I think your honor has noted an exception in refusing to give the first instruction asked by the defendant to the jury to find a verdict for the defendant, upon the ground that there is no evidence in the case to justify the submission of the case to the jury, and no question of fact that they are called upon to determine; also to the action of the court in refusing to give the instruction immediately following the same asked by the defendant, in substance and to the effect that the plaintiffs could not recover in this case unless the decedent, Jay H. Adams, under the evidence given in the case could himself have recovered had he been injured only by the same accident which caused his death and sued to recover for his own injury.

And thereupon the jury retired, and, after an absence, returned into court with a verdict in favor of the plaintiffs for damages, said verdict being in favor of the plaintiff, Louise H. Adams, in the sum of twelve thousand dollars damages, and in favor of the plaintiff,

Frank H. Adams, in the sum of two thousand dollars damages, upon the said cause of action, on the 5th day of December, 1900.

Thereafter, within the time allowed by law, the defendant moved the court to set aside the verdict and for a new trial, which motion came on regularly for hearing, both parties being present, and was argued by counsel for the respective parties, and by the court overruled. Whereupon, thereafter, and on the 14th day of December, 1900, a single judgment was rendered and entered upon said verdict in favor of the plaintiffs and against the defendant; said judgment being in favor of Louise H. Adams for $12,000.00, and in
831 favor of Frank H. Adams for $2,00000; the total amount of said judgment being for the sum of fourteen thousand dollars, with costs and disbursements.

And thereafter the court, upon the stipulation of the parties in open court, and upon the application of the defendant, extended the time for preparing, presenting, filing and serving the bill of exceptions herein sixty days from and after the date of the entry of judgment herein, to wit: Up to and including the 12th day of February, 1901; and thereafter, and before the time theretofore granted within which said bill of exceptions should be presented, filed and served had expired, and upon the stipulation of the parties agreeing thereto, and on, to wit: The 4th day of February, 1901, the court, upon the application of the defendant, and by its order made in open court, again extended the time for preparing, presenting, filing and serving the bill of exceptions herein, up to and including the tenth day of March, 1901.

And now, in furtherance of justice, and that right may be done, the defendant presents the foregoing as its bill of exceptions in this cause, and prays that the same may be settled and allowed and signed and certified by the judge, as provided by law and the practice of this honorable court.

WILL H. THOMPSON AND
STEPHENS & BUNN,
Attorneys for Defendant.

832 In the Circuit Court of the United States in and for the District of Washington, Eastern Division.

LOUISE H. ADAMS and FRANK H. ADAMS, Plaintiffs,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, Defendant.

Order Approving Bill of Exceptions.

This cause having been brought on regularly before the court on this 10th day of March, 1901, upon the application of the defendant for the settling and certifying of its proposed bill of exceptions, lately filed herein, on, to wit, the 9th day of March, 1901, the time for presenting, filing and serving such proposed bill of exceptions having theretofore been extended by the stipulations of the parties

and by the orders of this court up to and including the tenth day of March, 1901, and the said proposed bill of exceptions having been presented, filed, and served within the time allowed by said stipulations and orders, and the plaintiffs not having proposed or offered any amendments to the said proposed bill of exceptions, within the time allowed by law or at all:

Now, therefore, on motion of Will H. Thompson and Stephens and Bunn, attorneys for defendants, it is ordered that said pro-
833 posed bill of exceptions heretofore filed by the defendant in this cause, is hereby approved, allowed, and settled as the true, full, and correct bill of exceptions in this cause, containing in full all the evidence and proceedings taken and had upon the trial of said cause, and all of the exhibits except those which it is impossible to print, which latter exhibits will be sent up by special order of the court hereafter to be made, and that the same as so settled and allowed be now and here certified accordingly by the undersigned, the judge of this court, who presided at the trial of this cause, and that said bill of exceptions when so certified be filed herein by the clerk.

Done in open court this 2d day of April, 1901.

C. H. HANFORD, *Judge.*

The foregoing bill of exceptions is full, true, and correct in all respects, and is hereby approved, allowed and settled and made a part of the record herein.

Done in open court, this 2d day of April, 1901.

C. H. HANFORD, *Judge.*

Due service of the within and foregoing bill of exceptions by receipt of a true copy thereof, after the filing of the original thereof, admitted this 9th day of March, 1901.

VOORHEES & VOORHEES,
Attorneys for Plaintiffs.

(Endorsed:) Filed March 9th, 1901. A. Reeves Ayres, clerk, United States circuit court.

834 And afterwards, to wit, on the 5th day of February, 1901, there was duly filed in said court, in said cause, a stipulation and order extending time for filing and serving bill of exceptions, in the words and figures following, to wit:

In the Circuit Court of the United States in and for the District of Washington, Eastern Division.

LOUISE H. ADAMS and FRANK H. ADAMS, Plaintiffs,
vs.
NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendant.

Stipulation and Order Extending Time for Filing Bill of Exceptions.

It is hereby stipulated and agreed by and between the parties to the above-entitled action that the time in which defendant may prepare, present, file, and serve its bill of exceptions herein may be and is extended to ninety days from the date of entry of judgment herein, to wit, until and including the 10th day of March, 1901.

VOORHEES & VOORHEES,
Attorneys for Plaintiffs.
STEPHENS & BUNN,
WILL H. THOMPSON,
Attorneys for Defendant.

835 *Order.*

Upon reading and filing the above stipulation, it is ordered that the time within which defendant may prepare, present, file, and serve its bill of exceptions herein be, and the same is, hereby extended until and including the tenth day of March, 1901.

Done in open court, this 4th day of February, 1901.

C. H. HANFORD, *Judge.*

(Endorsed:) Filed February 5th, 1901. A. Reeves Ayres, clerk.

And afterwards, to wit, on the 1st day of May, 1901, there was duly filed in said court, in said cause, an assignment of errors, in the words and figures following, to wit:

In the Circuit Court of the United States in and for the District of Washington, Eastern Division.

LOUISE H. ADAMS and FRANK H. ADAMS, Plaintiffs,
vs.
NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendant.

Assignment of Errors.

836 Comes now The Northern Pacific Railway Company, the defendant in the above-entitled action, and makes and files the following assignment of errors in said cause, which said defendant and plaintiff in error will rely upon in the United States circuit court of appeals, for the ninth circuit, for relief from the judgment rendered in said cause in the court below, to wit:

I.

The court erred in sustaining plaintiff's demurrer to the second and further affirmativo defense and answer in defendant's amended answer to the second amended complaint.

II.

The court erred in permitting the witness Gabbert to testify, over defendant's objection, as to what the deceased, Mr. Adams, stated to him, the witness Gabbert, as the reason why the deceased left the car, wherein witness testified that the deceased had told him that the deceased was going to the dining-car to get some cigars. (Trans., folio —.) To the offer of which testimony the defendant objected, for the reason and upon the ground that any such statements were no part of the *res gestæ* in this case.

III.

The court erred in permitting the witness Gabbert to testify, over defendant's objection, as to what the deceased, Mr. Adams, told him as the reason why the deceased, Mr. Adams, left the car and as to what the deceased said when he arose about where he was going. (Trans., folio —.) To the offer of which testimony the de-
837 fendant objected, for the reason and upon the ground that any such statements were no part of the *res gestæ* in this case.

IV.

The court erred in permitting the witness Oscar S. Bowen to testify, over defendant's objection, as to statements made to him and information given to him by others relative to the circumstances surrounding the finding of the body of the deceased and as to the place where the body lay and as to such place being pointed out to the witness by others and as to the measurements and points which said witness Bowen made and indicated upon a tracing, all of which was based upon such information. (Trans., folio —.) To the offer of which testimony and the whole thereof, and each and every part thereof, the defendant objected on the grounds that the testimony was incompetent for the reason that the measurements and indications made on the tracing were made from statements and information made to and given to said witness by other parties.

V.

The defendant erred in permitting the same witness Bowen to testify, over defendant's objection, concerning the tracing made by him upon information given by other persons. (Trans., folio —.) To which offer the defendant objected, for the reason and upon the grounds last above stated.

VI.

The court erred in permitting witness Frank H. Adams, one of the plaintiffs in this action, to testify, over the objection of the
838 defendant, as to intention of himself and his father in regard to whether or not he, the witness, was to complete his college course. (Trans., folio —.) To which offer, and to the offer of any and all testimony of said witness, defendant objected, for the reason and upon the grounds that the witness was administrator of the estate of the deceased, and for the reason and upon the ground that the testimony was entirely incompetent as to what had been said between them or as to what their intentions might be.

VII.

The court erred in permitting witness Frank H. Adams, one of the plaintiffs in this action, to testify, over the objections of the defendant, as to purposes of his father and himself with regard to what witness should do after completing his college course. (Trans., folio —.) To which offer defendant objected, for the reason and upon the grounds last above stated, and that the testimony was immaterial because the question of the benefit that the witness would derive would be simply the benefit from the institution, and that question is wholly immaterial and incompetent.

VIII.

The court erred in permitting witness Frank H. Adams, one of the plaintiffs in this action, to testify, over defendant's objection, as to what the cost of a Harvard law course would be. (Trans., folio —.) To the offer of which testimony defendant objected, for the reasons and upon the grounds last above stated.

839 IX.

The court erred in permitting witness Frank H. Adams, one of the plaintiffs in this action, to testify, over defendant's objection, as to what the cost of burial of his father was. (Trans., folio —.) To which offer defendant objected, for the reason that the cost of the burial would be controlled wholly by those in charge of same, and whatever amount they expended in this way would form no basis for recovery in this action.

X.

The court erred in permitting the witness Smith to testify, over defendant's objection, as to what impressions he derived from the character of the wound upon the deceased's body regarding the nature of the object that had made the wound. (Trans., folio —.) To which offer defendant objected, for the reason and upon the ground that the witness could not testify as to any impression which he might have and could give only the facts and circumstances.

XI.

The court erred in permitting the witness Broberg to testify, over defendant's objection, as to what would be the effect if a car had gates fastened with iron clasps—that is, what would be the effect in preventing a person from being thrown or falling off the platform of the car. (Trans., folio —.) To which offer defendant objected, for the reasons and upon the grounds that the testimony was incompetent and immaterial and had no tendency to support any issue in the cause.

840 XII.

The court erred in permitting the witness Broberg to testify, over defendant's objection, regarding the question of whether some other railroad than that of the defendant had continued its adoption of vestibuled cars until substantially all of its cars were vestibuled. (Trans., folio —.) To which offer defendant objected, for the reason and upon the ground that it was incompetent, irrelevant, and immaterial, and upon the ground that what witness may have known as to what some other railroad had succeeded in doing would be incompetent, irrelevant and immaterial.

XIII.

The court erred in sustaining the objection of plaintiffs to testimony offered by defendant through the witness Gilbert, for the purpose of showing that the defendant railway company had not been able, with all diligence, to vestibule all of its cars before the time of this accident. (Trans., folio —.) Which objection was sustained on the ground that defendant could not prove anything that had happened since the 13th day of November, 1898.

XIV.

The court erred in sustaining plaintiffs' objection to the testimony offered by defendant through the witness Long for the purpose of showing that the waters of Pend d'Oreille lake had risen at different times and different seasons so as to cover the whole track of the railroad at the point of the accident. (Trans., folio —.)
841 Which objection was sustained without the statement of any grounds of objection by plaintiff's counsel.

XV.

The court erred in sustaining the objection of plaintiffs' counsel to the testimony offered by defendant through the witness Humphrey as to what, if anything, he, the witness, did as to assisting the deceased onto the train. (Trans., folio —.) Which objection was sustained upon the ground that the testimony was immaterial.

XVI.

The court erred in sustaining the objection of plaintiffs to the offer of the defendant of the evidence consisting of the railroad pass upon which the decedent, Jay H. Adams was riding and being transported at the time of his death, and the court erred in sustaining the objection to the defendant's offer to show the contents of said pass and the stipulations therein contained, exempting the defendant from liability, and the court erred in sustaining plaintiffs' objection to the offer of defendant to show that the deceased was, at the time of his death, riding upon a free and gratuitous annual pass upon the back of which was a stipulation and agreement signed by the deceased exempting the defendant from liability. (Trans., folio —.) Which objections, and each of them, were sustained upon the ground that the plaintiffs in this action would neither of them be bound by any contract made by the deceased.

842 XVII.

The court erred in refusing to grant defendant's motion to direct a verdict for the defendant, made at the close of all the testimony, which motion was based upon the ground that there is no evidence in the case to justify the submission thereof to the jury, and no question of fact that they should be called upon to determine. (Trans., folio —.)

XVIII.

The court erred in refusing to give to the jury instruction numbered 1, offered by the defendant, which instruction is as follows:

"Gentlemen of the jury, I instruct you that under the law, and the evidence in this case, it is your duty to return a verdict for the defendant." (Trans., folio —.)

To which refusal the defendant excepted, and its exception was allowed.

XIX.

The court erred in refusing to give to the jury defendant's instruction numbered 2, which reads as follows:

"I instruct you, gentlemen of the jury, that under the evidence given in this case, that the plaintiffs cannot recover for the death of Jay H. Adams, unless, under the evidence given in the case, Jay H. Adams could himself have recovered damages in the cause, had been injured only, and was bringing the action in his own name, for his own injury. In other words, had Jay H. Adams been injured only, by reason of whatever accident or circumstances caused
843 his death, and he should have brought an action against the defendant for the purpose of recovering damages for that injury, and the evidence in the case tending to show how he was injured had been precisely the same with reference to the accident as it has been in this case, then if, under such circumstances, you should find that Mr. Adams was not entitled to recover, you would

not be justified in returning a verdict for the plaintiffs in this cause." (Trans., folio —.)

To which refusal of the court defendant excepted and its exception was allowed.

XX.

The court erred in giving to the jury that part of paragraph 6 of the instructions given by the court which reads as follows:

"Their case rests upon the same legal grounds as it would if Mr. Adams, without being a passenger upon the defendant's train, and without holding any contractual relations whatever with the defendant, had been killed by the wrongful act of the defendant" (Trans., folio —); and in giving each and every part of said portion of said instruction.

To which action of the court in giving said part, and each and every part of said instruction, defendant excepted, and each of its exceptions was allowed.

XXI.

The court erred in giving to the jury that part of instruction numbered 6 given by the court, which reads as follows:

"And in every such action the jury may give such dam-
844 ages, pecuniary or exemplary, as under all the circumstances of the case may to them seem just." (Trans., folio —.)

And the court erred in giving each and every part of said instruction.

To which action of the court in giving said part of said instruction, and each and every part of said instruction, defendant excepted, and each of its exceptions was allowed.

XXII.

The court erred in giving to the jury that portion of the same instruction last above referred to, to wit, that numbered 6 as given by the court, which reads as follows:

"Their right to maintain this action—assuming that the charge which they make against the defendant is true, and supported by evidence—is a right given to them by the statutes of this State in which the case is being tried, and by the statutes of the State of Idaho, where the injury occurred. The statutes of Idaho are similar to the statutes of this State, in providing that when the death of a person is caused by the wrongful act or negligence of another, his heirs or personal representatives may maintain an action for damages against the person causing the death. And in every such action the jury may give such damages, pecuniary or exemplary, as under all the circumstances of the case may to them seem just." (Trans., folio —.)

And the court erred in the giving of each and every part of said portion of said instruction.

845 To which action of the court in giving each and every part of said portion of said instruction defendant excepted, and its exceptions were allowed by the court.

XXIII.

The court erred in giving to the jury that portion of instruction numbered 22 given by the court, and which reads as follows:

"Now, I submit this question to you as a question of that kind, as a question that is disputed between these parties, and your judgment is appealed to to say whether it was negligence or not, upon the part of the defendant company, to have that unvestibuled car in that train, without railings, rods, chains, or gates, to enclose the platforms." (Trans., folio —.)

And the court erred in the giving of each and every part of said portion of said instruction.

To which action of the court in giving said portion of said instruction defendant excepted, and its exception was allowed.

XXIV.

The court erred in giving to the jury instruction numbered 26 of those given by the court, which reads as follows:

"You are, therefore, to consider all of the testimony as a whole and ev ry part of it, and endeavor the best you can to determine what the fact is as to what caused Mr. Adams' death. If you find that he was thrown or hurled or precipitated from a platform of the car by a force which he could not resist, which was due to the
846 lack of care for the safety of passengers upon the part of the defendant company, either in having an unenclosed platform in that train, or in operating the train so rapidly around a curve in the road as to amount to negligence, and that that was the cause of Mr. Adams' death—then the plaintiffs have made a *prima facie* case entitling them to such damages as the jury may award, unless the jury find that the affirmative defense has been established by a fair preponderance of the evidence." (Trans., folio —.)

To which action of the court in giving such instructions defendant excepted, and its exception was allowed, and defendant excepted to the giving of each and every part of said instruction, and each of its exceptions was allowed.

XXV.

The court erred in giving to the jury instruction numbered 29 as given by the court, which reads as follows:

"The defendant is admitted to be a common carrier of passengers, operating a railroad train for the purpose of carrying passengers, inviting the public to patronize their line of road, and undertaking and being required by the law to provide trains of cars to carry passengers, completely equipped with all that is necessary to make their cars strong and safe for passengers to ride upon, and to have their trains fully manned with competent servants to operate the engine and the brakes, and all the means and appliances for running the train with safety to the passengers. The carrier is required by the law to be diligent and to exert the highest degree of care and skill for
847 the safety of the passengers who travel upon its line of road. The law imposes upon the carrier a duty as a public servant

to do this. It is a duty which the carrier owes to the public in general, and to each member of the community who has occasion to require its services. The duty which the carrier in this case owed is to be considered with reference to the situation of the plaintiffs. You are not to consider what was the duty of this carrier toward Mr. Adams, who was killed, but the duty which the defendant owed to these plaintiffs; and the duty which they have the right to exact from the defendant in this case is the same duty which the defendant company owed to the public in general—and that is the duty to operate the cars and trains fully and completely equipped with whatever is known to be in use and serviceable and suitable and obtainable and proper in the way of equipage of a railroad for carrying passengers safely; and to employ only, in the operation of these trains, servants who are competent to handle the trains with the greatest degree of skill. It is not for me to say as a matter of law that at the time this train was operated, that the complete vestibuling of all the cars in the makeup of the passenger train was a duty of the defendant. I do say that it is the duty of the defendant to be diligent and to exercise prudence, and a high degree of care, to make that train safe. And it is for you to say, by applying this general principle to the peculiar facts and circumstances of this case,

848 whether there was a breach of that duty in having in this train an unvestibuled car, without a complete enclosure of its platforms by rods chains or gates." (Trans., folio —.)

To which action of the court in giving said instruction defendant excepted, and its exception was allowed.

XXVI.

The court erred in giving to the jury that portion of instruction numbered 29 as given by the court, which reads as follows:

"The law imposes upon the carrier a duty as a public servant to do this. It is a duty which the carrier owes to the public in general and to each member of the community who has occasion to require its services." (Trans., folio —.)

To which action of the court in giving said portion of said instruction defendant excepted, and its exception was allowed.

XXVII.

The court erred in giving to the jury that portion of instruction numbered 29 as given by the court, which reads as follows:

"The duty which the carrier in this case owed is to be considered with reference to the situation of the plaintiffs. You are not to consider what was the duty of this carrier to Mr. Adams who was killed, but the duty which the defendant owed to these plaintiffs; and the duty which they have the right to exact from the defendant in this case is the same duty which the defendant company owed to the public in general—and that is the duty to operate the

849 cars and trains fully and completely equipped with whatever is known to be in use and serviceable and suitable and obtainable and proper in the way of equipage of a railroad for

carrying passengers safely; and to employ only, in the operation of these trains, servants who are competent to handle the trains with the greatest degree of skill. It is not for me to say as a matter of law that at the time this train was operated, that the complete vestibuling of all the cars in the makeup of the passenger train was a duty of the defendant. I do say that it is the duty of the defendant to be diligent and to exercise prudence and a high degree of care, to make that train safe. And it is for you to say, by applying this general principle to the peculiar facts and circumstances of this case, whether there was a breach of that duty in having in this train an unvestibuled car, without a complete enclosure of its platforms by rods, chains, or gates." (Trans., folio —.)

And the court erred in giving each and every part of said portion of said instruction.

To which action of the court in giving said portion of said instruction defendant excepted, and its exception was allowed.

XXVIII.

The court erred in giving to the jury instruction numbered 31 of the instructions given by the court, which reads as follows:

"All of these pleadings will be placed in charge of the jury; therefore, I want to teli you that following this first affirmative defense there is set out in the answer another affirmative defense
which you are not to consider at all, because the court has
850 decided that it is not a bar, even if what is said there be
true—it is not a bar to the recovery of damages by these plaintiffs, if the other facts which they allege have been proven; that is, the part of the answer which states that Mr. Adams was a passenger riding upon a free pass containing a contract by which he agreed to exempt the company from any liability for any injury which might result to himself while traveling on trains, caused by the negligence of servants and employees of the road. That is entirely eliminated from your consideration, because the court has decided that Mr. Adams' contract could only affect his own right, and would not operate to deprive the plaintiffs of a right to recover for their injury. Their injury is different from his. They are not seeking to recover anything for the physical pain which he suffered, but they are complaining of an injury to them in being deprived of his support, and the pecuniary benefit which his life was to them." (Trans., folio —.)

And the court erred in the giving of each and every part of said instruction.

To which action of the court in giving said instruction, and in giving each and every part thereof, defendant excepted, and its exception was allowed.

XXIX.

The court erred in giving to the jury instruction numbered 33 of the instructions given by the court, which reads as follows:

"The court instructs you that in cases of this character there is no fixed measure of damages, and no artificial rule by
851 which the damages in a given case can be computed; and if you should find for the plaintiffs, or either of them, the amount of damages must be determined by your sound sense and good judgment, and as under all of the circumstances of the case shall to you seem just." (Trans., folio —.)

And the court erred in giving each and every part of said instruction.

To the giving of which instruction, and to the giving of each and every part of same, this defendant excepted, and its exceptions and each of them were allowed.

XXX.

The court erred in giving to the jury instruction numbered 34 of the instructions given by the court, which reads as follows:

"You are instructed that the law, out of regard to the instinct of self-preservation, will presume, *prima facie* that a passenger who has suffered death by a railroad accident, was, at the time of the accident, in the exercise of due care, and this presumption is not overthrown by the mere fact of the injury. In absence, therefore, of an eye-witness, it will be presumed, unless it is shown to the contrary, that at the time of the accident, the deceased, Jay H. Adams was in the exercise of due care. The plaintiffs in this action are entitled to invoke the aid of the legal presumption of due care upon the part of the deceased and the defendant corporation has the burden to overthrow such presumption by evidence sufficient
852 to do so, and this burden is not sustained by the production of evidence which leaves the question of contributory negligence in doubt, and such presumption can only be overthrown by a preponderance of the evidence." (Trans., folio —.)

And the court erred in giving each and every part of said instruction.

To the giving of which instruction, and to the giving of each and every part of the same, this defendant excepted, and its exceptions were allowed.

XXXI.

The court erred in giving to the jury instruction numbered 38 of the instructions given by the court, which reads as follows:

"You are instructed that if you find for the plaintiffs, or either of them, you will allow them, or either of them, such damages as you deem to be reasonably sufficient to make good to the plaintiffs, or either of them, the pecuniary loss to them, or either of them, occasioned by the death of Jay H. Adams. This pecuniary loss is not limited to a present money loss, but in determining it you may consider any evidence before you tending to show what was the reasonable expectation of pecuniar benefits to the plaintiffs, or either of them, from a continuance of his life. By pecuniary benefits is meant any benefits having a pecuniary or money value. The age

of deceased, his health, his habits of industry, his accustomed earnings, his capacity for business, his standing in his profession, the size of his practice, and the like, as far as they appear in
853 evidence, are proper to be considered. It is also proper to consider the reasonable expectation of life of the deceased and of the plaintiff Louise H. Adams in determining the probable duration of the receipt by her of pecuniary benefit, if you should find she would have received any, from the continuance of the life of the deceased." (Trans., folio —.)

And the court erred in giving each and every part of said instruction.

To the giving of which instruction, and to the giving of each and every part of same, this defendant excepted, and its exceptions were allowed.

XXXII.

The court erred in giving to the jury instruction numbered 39 of the instructions given by the court, which reads as follows:

"In this connection I will say to you that according to the tables showing the average duration of human life, Mr. Adams' expectancy at the time of his death was a fraction over twenty years; and at that time Mrs. Adams' expectancy—that is, the probability of the length of her life from that time—would be a fraction less than twenty-one years." (Trans., folio —.)

And the court erred in giving each and every part of said instruction.

To the giving of which instruction, and to the giving of each and every part of same, this defendant excepted, and its exceptions were allowed.

XXXIII.

854 The court erred in giving to the jury instruction numbered 40 of the instructions given by the court, which reads as follows:

"You are instructed that it is not necessary, to enable the plaintiff, Frank H. Adams to recover, that he had a legal claim on the deceased for any of the pecuniary benefits claimed by him to be lost by him because of the death of Jay H. Adams, nor is the majority of said plaintiff, Frank H. Adams, a bar to such recovery." (Trans., folio —.)

And the court erred in giving each and every part of said instruction.

To the giving of which instruction, and to the giving of each and every part of same, this defendant excepted, and its exceptions were allowed.

The defendant duly excepted to the rulings of the court in the matter of each of the above errors assigned, and hereby, and now, assigns each and every of the said rulings as error.

WILL H. THOMPSON AND
STEPHENS & BUNN,
Attorneys for Defendant.

UNITED STATES OF AMERICA, } ss:
District of Washington, }

I hereby certify that I received the within and foregoing assignment of errors, on the 28th day of May, 1901, and personally
855 served the same on Reese H. Voorhees, one of the attorneys of record for Louise H. Adams and Frank H. Adams, defendants in error in the above-entitled cause, on said 28th day of May, 1901, at Spokane, in Spokane county, State and district of Washington, by then and there personally delivering to and leaving with the said Reese H. Voorhees a copy thereof certified to by A. Reeves Ayres, clerk of the United States circuit court for the district of Washington, by James O'Neill, deputy, under the seal of said court.

C. W. IDE,
United States Marshal,
By G. L. IDE, *Deputy.*

(Endorsed:) Filed May 1st, 1901. A. Reeves Ayres, clerk. By James O'Neill, deputy.

856 And afterward, to wit, on the 1st day of May, 1901, there was duly filed in said court, in said cause, a petition for writ of error in the words and figures following, to wit:

In the Circuit Court of the United States in and for the District of Washington, Eastern Division.

LOUISE H. ADAMS and FRANK H. ADAMS, Plaintiffs,
vs.
NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendant.

Petition for and Order Allowing Writ of Error, etc.

To the honorable judges of the circuit court of the United States, district of Washington, eastern division:

Your petitioner, the above-named defendant, considering itself aggrieved by the decision and judgment of the court aforesaid, made and entered herein December 14, 1900, and filed herein December 14, 1900, does pray for a writ of error from said decision and judgment to the United States circuit court of appeals in and for the ninth judicial circuit of the United States, and prays that said writ may be allowed, and that a transcript and record of the pro-
857 ceedings upon which said judgment was rendered, duly authenticated, together with the assignment of errors annexed thereto, may be sent to the said circuit court of appeals in and for the ninth judicial circuit of the United States.

Dated Spokane, April 25th, 1901.

WILL H. THOMPSON AND
STEPHENS & BUNN,
Attorneys for Defendant.

Now, on this 22d day of May, 1901, the writ of error herein prayed for is allowed, and bond fixed at twenty-eight thousand dollars, and the same allowed to act as supersedeas.

C. H. HANFORD,
Judge of the United States Circuit Court,
Ninth Judicial Circuit, District of Washington.

UNITED STATES OF AMERICA, }
District of Washington, } ss:

I hereby certify that I received the within and foregoing petition for writ of error, on the 28th day of May, 1901, and personally served the same on Reese H. Voorhees, one of the attorneys of record for Louise H. Adams and Frank H. Adams, defendants in error in the above-entitled cause, on said 28th day of May, 1901, at Spokane, in Spokane county, State and district of Washington, by then and there personally delivering to and leaving with the said Reese H. Voorhees a copy thereof certified to by A. Reeves Ayres,
858 clerk of the United States circuit court for the district of Washington, by James O'Neill, deputy, under seal of said court.

C. W. IDE,
United States Marshal,
By G. L. IDE, *Deputy.*

(Endorsed:) Filed May 1st, 1901. A. Reeves Ayres, clerk. By James O'Neill, deputy.

And afterwards, to wit, on the 17th day of May, 1901, there was duly filed in said court, in said cause, a bond on writ of error in the words and figures following, to wit:

In the Circuit Court of the United States in and for the District of Washington for the Eastern Division.

LOUISE H. ADAMS and FRANK H. ADAMS, Plaintiffs,
vs.
NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendant.

Bond on Writ of Error.

Know all men by these presents, that we, The Northern Pacific Railway Company, a corporation, as principal, and F. H. Mason and J. F. Herrick, as sureties, are held and firmly bound unto
859 Louise H. Adams and Frank H. Adams, and each of them in the full and just sum of twenty-eight thousand dollars ($28,000.00), to be paid to the said Louise H. Adams and Frank H. Adams, their heirs, executors, administrators, legal representatives or assigns to which payment well and truly to be made, we bind

ourselves, and our and each of our successors, heirs, executors, administrators and legal representatives, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 17th day of May, A. D. 1901.

Whereas, lately, in the circuit court of the United States, in and for the district of Washington, eastern division, in an action pending in said court between Louise H. Adams and Frank H. Adams, as plaintiffs, and The Northern Pacific Railway Company, a corporation, as defendant, a judgment was rendered in favor of said plaintiffs, and against said defendant, for the sum of fourteen thousand dollars ($14,000.00) and costs of action, and the said Northern Pacific Railway Company has obtained from said court a writ of error to reverse said judgment in the aforesaid action, and a citation directed to the said above-named plaintiffs, citing and admonishing them to appear in the United States circuit court of appeals for the ninth circuit, to be holden at San Francisco, in the State of California:

Now, the consideration of this obligation is such, that if the said Northern Pacific Railway Company, plaintiff in error, shall prosecute its said writ of error to effect and answer all damages and costs, if it fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and effect.

NORTHERN PACIFIC RAILWAY COMPANY,
By STEPHENS & BUNN, *Its Attorneys.*
F. H. MASON. [SEAL.]
J. F. HERRICK. [SEAL.]

STATE OF WASHINGTON, } ss:
County of Spokane, }

F. H. Mason and J. F. Herrick, being first duly sworn, on oath, each for himself, and not one for the other, deposes and says:

That he is one of the sureties upon and who executed the above and foregoing undertaking and obligation; that he is a resident and freeholder in the district of Washington; and that he is worth the sum of twenty-eight thousand dollars ($28,000.00), the sum mentioned in the foregoing bond and obligation, over and above all just debts and liabilities, and exclusive of property exempt from execution, in property situated in the State of Washington.

That he is not an officer of the above court or an attorney at law.

F. H. MASON.
J. F. HERRICK.

Subscribed and sworn to before me this 17th day of May, 1901.

[SEAL.] E. T. WHITE,
Notary Public in and for the State of Washington,
Residing at Spokane, Washington.

861 The foregoing bond and surety thereby offered is hereby approved this 22d day of May, A. D. 1901.

C. H. HANFORD,
District Judge, Sitting in Chambers of the United States Circuit Court, Ninth Judicial Circuit, District of Washington.

UNITED STATES OF AMERICA, }
District of Washington, } ss.

I hereby certify that I received the within and foregoing bond on writ of error on the 25th day of May, 1901, and personally served the same on Reese H. Voorhees, one of the attorneys of record for Louise H. Adams and Frank H. Adams, defendants in error in the above-entitled cause, on said 28th day of May, 1901, at Spokane, in Spokane county, State and district of Washington, by then and there personally delivering to and leaving with the said Reese H. Voorhees a copy thereof certified to by A. Reeves Ayres, clerk of the United States circuit court for the district of Washington, by James O'Neill, deputy, under seal of said court.

C. W. IDE,
United States Marshal,
By G. L. IDE, *Deputy.*

(Endorsed:) Filed May 17, 1901. A. Reeves Ayres, clerk. By James O'Neill, deputy.

862 And afterwards, to wit, on the 22d day of May, 1901, there was duly lodged and filed in said court, in said cause, a copy of the writ of error, in the words and figures following, to wit:

Writ of Error (Copy).

UNITED STATES OF AMERICA, ss.

The President of the United States of America to the judges of the circuit court of the United States, ninth circuit, in and for the district of Washington, eastern division, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Louise H. Adams and Frank H. Adams, as plaintiffs, and The Northern Pacific Railway Company, a corporation, as defendant, a manifest error hath happened, to the great damage of the said Northern Pacific Railway Company, as by its complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit

court of appeals, for the ninth circuit, at San Francisco, State
863 of California, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date of this writ in the said court, to be there and then held, that the record and proceedings aforesaid being inspected, the said court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 22d day of May, in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States the one hundred and twenty-fifth.

[SEAL.] A. REEVES AYRES,
Clerk United States Circuit Court, District of Washington,
By SAMUEL D. BRIDGES,
Deputy Clerk.

The above writ of error is hereby allowed.

C. H. HANFORD,
District Judge Presiding in said Circuit Court.

(Endorsed:) Filed in the United States circuit court, May 22, 1901. A. Reeves Ayres, clerk. By Samuel D. Bridges, deputy.

864 In the Circuit Court of the United States in and for the District of Washington, Eastern Division.

LOUISE H. ADAMS and FRANK H. ADAMS, Plaintiffs,
vs.
NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendant.

Præcipe for Transcript.

To the clerk of the above-named court:

You will please prepare transcript of the complete record in the above-entitled cause, to be filed in the office of the clerk of the United States circuit court of appeals for the ninth judicial circuit, under the writ of error to be perfected to said court, and include in said transcript the following pleadings, proceedings, papers and records and files, to wit:

Summons.
Complaint.
Defendant's motion to strike from complaint and to make complaint more definite and certain.
Order overruling motion to strike from complaint and sustaining motion to make complaint more definite and certain.
865 Amended complaint.
Answer to amended complaint.
Plaintiff's motion to strike from answer to amended complaint.
Order upon motion to strike from answer to amended complaint.

Plaintiff's demurrer to third affirmative answer and defense in answer to amended complaint.

Opinion of court upon demurrer to third and affirmative answer and defense in answer to amended complaint.

Order sustaining demurrer to third affirmative answer and defense in answer to amended complaint.

Reply to answer to amended complaint.

Second amended complaint.

Amended answer to second amended complaint.

Motion to strike from amended answer to second amended complaint.

Order denying motion to strike from amended answer to second amended complaint.

Demurrer of plaintiffs to second and further affirmative answer and defense in amended answer to second amended complaint.

Order sustaining demurrer to second further and affirmative defense set forth in amended answer to second amended complaint.

Reply to amended answer to second amended complaint.

Verdict.

Motion for new trial and to set aside verdict.

866 Order denying motion for new trial and to set aside verdict.

Judgment.

Stipulations and orders extending time for presenting, serving and filing bill of exceptions.

Bill of exceptions.

Admission of service of bill of exceptions.

Order settling bill of exceptions.

Petition for allowance of writ of error and order allowing writ of error and fixing amount of bond.

Assignment of errors.

Bond on writ of error.

Writ of error.

Citation on writ of error and proof of service thereof. And any and all other record entries, pleadings, proceedings, papers and filings necessary or proper to make a complete record upon said writ of error in said cause.

Said transcript to be prepared as required by law and the rules of this court and the rules of the United States circuit court of appeals for the ninth judicial circuit.

WILL H. THOMPSON AND
STEPHENS & BUNN,
Attorneys for Defendant, Northern Pacific Railway Company, Plaintiff in Error.

(Endorsed:) Filed May 1st, 1901. A. Reeves Ayres, clerk. By James O'Neill, deputy.

867 *Clerk's Certificate to Transcript.*

UNITED STATES OF AMERICA, } ss:
District of Washington, }

I, A. Reeves Ayres, clerk of the circuit court of the United States for the district of Washington, do hereby certify that the foregoing typewritten pages, numbered from one to eight hundred and ninety-six, inclusive, constitute and are a complete, true, and correct copy of the record, papers and all proceedings had in said action, as the same remain on file and of record in said circuit court, and that the same which I transmit, constitute my return to the annexed writ of error, lodged and filed in my office on the 22d day of May, A. D. 1901.

I also annex and transmit the original citation in said action.

I further certify that the cost of preparing and certifying said record amounts to the sum of $317.70, and that the same has been paid in full by the attorneys for the plaintiff in error.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said circuit court, at the city of Spokane, in said district of Washington, in the ninth circuit, the first day of June, A. D. 1901, and the Independence of the United States the 125th.

[SEAL.] A. REEVES AYRES, *Clerk*,
By SAMUEL D. BRIDGES, *Deputy*.

(Ten cent U. S. int. rev. stamp. Canceled.)

868 *Writ of Error (Original).*

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the judges of the circuit court of the United States, ninth circuit, in and for the district of Washington, eastern division, Greeting:

Because in the record and proceeding, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Louise H. Adams and Frank H. Adams, as plaintiffs, and The Northern Pacific Railway Company, a corporation, as defendant, a manifest error had happened, to the great damage of the said Northern Pacific Railway Company, as by its complaint appears, and it being fit, that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals, for the ninth circuit, at San Francisco, State of California, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date

of this writ, in the said court, to be there and then held, that the record and proceedings aforesaid be inspected, the said court may cause further to be done therein to correct that error what of right
869 and according to the law and custom of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 22d day of May, in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States, the one hundred and twenty-fifth.

A. REEVES AYRES,
Clerk United States Circuit Court, District of Washington,
By SAMUEL D. BRIDGES,
Deputy Clerk.

The above writ of error is hereby allowed.

[SEAL.] C. H. HANFORD,
District Judge, Presiding in said Circuit Court.

UNITED STATES OF AMERICA, } ss:
District of Washington, }

I hereby certify that I received the within and foregoing writ of error on the 28th day of May, 1901, and personally served the same on Reese H. Voorhees, one of the attorneys of record for Louise H. Adams and Frank H. Adams, defendants in error in the above-entitled cause, on said 28th day of May, 1901, at Spokane, in Spokane county, State and district of Washington, by then and there personally delivering to and leaving with the said Reese H. Voorhees a copy thereof certified to by A. Reeves Ayres, clerk of
870 the United States circuit court for the district of Washington, by James O'Neill, deputy, under the seal of said court.

C. W. IDE,
United States Marshal,
By G. L. IDE, *Deputy.*

(Endorsed:) Filed in the United States circuit court, May 22, 1901. A. Reeves Ayres, clerk. Sam'l D. Bridges, deputy.

Citation (Original).

UNITED STATES OF AMERICA, ss:

To Louise H. Adams and Frank H. Adams, defendants in error, Greeting:

You, and each of you, are hereby cited and admonished to be and appear at the United States circuit court of appeals, for the ninth circuit to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the district of Washington, eastern division, wherein the Northern Pacific Railway Company, a corporation, is plaintiff in

error, and you, Louise H. Adams and Frank H. Adams, are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

871 Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of said circuit court, this 24th day of May, in the year of our Lord, one thousand nine hundred and one, and of our Independence the one hundred and twenty-fifth.

C. H. HANFORD,
District Judge, Presiding in said Circuit Court.

Attest:
[SEAL.]

A. REEVES AYRES,
Clerk United States Circuit Court,
District of Washington,
By SAM'L D. BRIDGES,
Deputy Clerk.

UNITED STATES OF AMERICA, } ss:
District of Washington, }

I hereby certify that I received the within and foregoing citat on on the 28th day of May, 1901, and personally served the same on Reese H. Voorhees, one of the attorneys of record for Louise H. Adams and Frank H. Adams, defendants in error in the above-entitled cause, on said 28th day of May, 1901, at Spokane, in Spokane county, State and district of Washington, by then and there personally delivering to and leaving with the said Reese H. Voorhees a copy thereof certified to by A. Reeves Ayres, clerk of the United States circuit court, for the district of Washington, by James O'Neill, deputy, under the seal of said court.

C. W. IDE,
United States Marshal,
By G. L. IDE, *Deputy.*

872 (Endorsed:) Filed in United States circuit court, May 28, 1901. A. Reeves Ayres, clerk. By James O'Neill, deputy. (Endorsed:) No. 707. In the United States circuit court of appeals, for the ninth circuit, Northern Pacific Railway Company, plaintiff in error, *vs.* Louise H. Adams and Frank H. Adams, defendants in error. Transcript of record. In error to the circuit court of the United States, for the district of Washington, eastern division, Spokane. Filed June 8, 1901. F. D. Monckton, clerk.

873 In the United States Circuit Court of Appeals for the Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
LOUISE H. ADAMS and FRANK H. ADAMS, Defendants in Error. } No. 707.

In error to the circuit court of the United States for the district of Washington.

This was an action to recover damages from the plaintiff in error for the loss sustained through the alleged negligent killing of Jay H. Adams, the husband and father of the defendants in error. A verdict was obtained in the lower court in favor of the defendants in error, in the sum of $14,000, and judgment entered for that amount. The case is now before this court upon writ of error, to reverse that judgment.

It appears that the deceased, Jay H. Adams, was an attorney at law residing at Spokane, Washington, frequently having occasion to travel over the lines of railroad in that section of the country. On November 13, 1898, the deceased, in company with a friend, took the east-bound overland train of the Northern Pacific Railway Company at Spokane about 8 a. m., and continued to ride thereon until the town of Hope, Idaho, was reached, at which point they left the train. They remained in Hope several hours, taking the regular west-bound overland train of the same company for Spokane at 4.15 p. m.
874 of the same day, this train being some three hours and ten minutes late in arriving at Hope. The train consisted of an engine and eight cars, placed in the following order: Engine, mail, baggage, express, smoking car, day coach, tourist sleeper, dining car, and standard Pullman sleeper. These cars were vestibuled, with the exception of the tourist sleeper, which was not only not vestibuled, but had no device whatever for enclosing its platforms or guarding persons who might be upon the same.

The deceased, with his friend, boarded the train at either the rear end of the smoking car or the front platform of the adjoining first-class day coach, and proceeded immediately forward into the smoking car, where they took seats. Very shortly after the train left Hope the deceased left the smoking car to go to the dining car for the purpose of getting some cigars. He did go to the dining car, purchased the cigars, and left the dining car again, going in the direction of the smoking car. He did not return to the smoking car, and was not again seen alive. His body, in a somewhat mutilated condition, was found the next day opposite a six-degree curve in the railroad track and between the track and the waters of Pend d'Orielle lake, at a point about six and a half miles west from the town of Hope.

The complaint charges the railway company with negligence in leaving an opening at the side of the platform of one of the cars of its train unguarded while the train was in motion, and in running

its train at a high and dangerous rate of speed around a sharp curve of the track; that by reason of this negligence the deceased was thrown from said train and killed; and that the plaintiffs are
875 damaged because of said death in the sum of one hundred thousand, four hundred and twenty-four dollars.

These charges are denied in the answer, and as matter of affirmative defense it is alleged that the negligence and carelessness of the deceased contributed to and caused his death; that he was perfectly familiar with the trains running on said line and knew of the unvestibuled car upon said train; that he well knew the nature of the country through which the said train was about to run and that the track had many sharp curves, and well knew the rate of speed at which the train would run; also, that he well knew there would be great risk and danger of being thrown from the train if attempting to pass from one car to another while the train was passing through said country. For a further affirmative defense it was alleged that the deceased was not a passenger for hire, but was a purely gratuitous passenger upon the terms and conditions and subject to the provisions of a free ticket, which terms and conditions were printed on the back of said ticket and were accepted and agreed to and signed by the deceased before boarding said train. These conditions were as follows:

"This free ticket is not transferable, and, if presented by another person than the individual named thereon, or if any alteration, addition or erasure is made upon it, it is forfeited, and the conductor will take it up and collect full fare.

"The person accepting this free ticket agrees that the Northern Pacific Railway Company shall not be liable, under any circumstances, whether of negligence of agents or otherwise, for any injury to the person, or for any loss or damage to the property, of the passenger using the same.

"I accept the above conditions."

It was alleged that under this contract and agreement the railway company owed the decedent no duty whatever as a common carrier toward a passenger for hire, and was therefore not liable for any loss or damage that might have occurred to the plaintiffs by
876 reason of the death of the said Jay H. Adams under the circumstances related. The court sustained a demurrer to this last affirmative defense, holding that as the plaintiffs did not base their demands upon any contract, but complained of a wrong resulting in an injury to them by deprivation of the support, protection, society and comfort of their husband and father, the question as to the validity of the contract under which the defendant claimed exemption from liability was immaterial. The case proceeded to trial upon the question of negligence, resulting in a verdict against the railway company.

Will H. Thompson and Stephens & Bunn, attorneys for plaintiff in error; C. W. Bunn, of counsel.

C. S. Voorhees and Reese H. Voorhees, attorneys for defendants in error.

Before Gilbert and Morrow, circuit judges, and Hawley, district judge.

MORROW, circuit judge, delivered the opinion of the court:

The error assigned is in sustaining the demurrer to the affirmative defense contained in the answer, the admission of certain testimony at the trial, and the giving of certain instructions to the jury and refusing to give certain other instructions.

The first question, then, for consideration, is, What effect, if any, did the contract between the deceased and the railway company have upon the plaintiffs' right of action?

877 It will be observed that the terms of the contract provided for the exemption of the railroad company from liability "for any injury to the person, or for any loss or damage to the property," of the passenger using the free ticket, caused by the negligence of agents or otherwise. Can this language be construed to relieve the railroad company from liability for the death of the person using such ticket, if such death is caused by the negligence of the carrier or its servants? In the first place, if such meaning could be given to the language of the contract, the contract would be void as against public policy. A man's life is not his own to be disposed of by contract. "A man may not barter away his life or his freedom or his substantial rights." Insurance Co. *v.* Morse, 20 Wall. 445, 451. The State has an interest in securing the safety and preserving the lives of its citizens. By both the common and the statute law the State has provided the greatest safeguards for the protection of the lives of its citizens. Negligent killing was manslaughter at the common law, and indictable. In many of our States it is similarly regarded, and severe penalties imposed therefor. The expressed permission by the deceased, therefore, that the railroad company might negligently take his life without consequent liability would have been in violation of both the common and statute law, and a void contract. But the contract in question, in our opinion, does not extend to the death of the party contracting; it is limited to injury to the person and loss to the property of that person. "Injury to the person" and "death of the person" are not synonomous terms; the one presumes a continuation of life, though in an impaired state, the other the destruction or ending of life. The law will permit a person to contract with reference

878 to the liability of a carrier which affects the person contracting solely, but will not permit him to contract with reference to the statutory liability of the carrier to others, in case of his death through the negligence of the carrier. Clark *v.* Geer, 86 Fed. 447; 32 C. C. A. 295.

What, then, is the statutory liability of the defendant herein to the representatives of the deceased, if liable at all?

By the statute of Idaho, in which State the deceased met with the fatal accident, action for death by wrongful act or neglect is permitted, as follows:

"When the death of a person, not being a minor, is caused by the

wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or, if such person be employed by another person who is responsible for his conduct, then, also, against such other person. In every action under this and the preceding section, such damages may be given as, under all the circumstances of the case, may be just." (Revised Stats. Idaho, sec. 4100.)

And by the statute of Washington, in which State this action was brought, it is provided that "when the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death. * * * In every such action the jury may give such damages, pecuniary or exemplary, as, under all the circumstances of the case, may to them seem just." (2 Ballinger's Annotated Codes and Statutes of Washington, sec. 4828.)

The action for damages against a party causing the death of another by wrongful act or neglect had its origin in Lord Campbell's act, 9 and 10 Victoria, and that act has served as a model for much of the statutory enactment in this country upon the subject. The
principal object of the act and the legislation following it
879 was to meet a supposed defect in the common-law rule that any right of action which an injured person might have against the person causing the injury abated with his death, and did not survive in favor of his heirs or representatives. An entirely new cause of action was created in favor of certain beneficiaries for damages caused to them by the loss of the deceased in consequence of the wrongful death. It was at first considered that Lord Campbell's act merely provided for a survival to the representatives of the right the deceased would have had to an action for personal injuries, had he lived; and following this construction many of our State statutes provide that the action will only lie when the death occurred under such circumstances that the deceased, had he lived, would have been entitled to sue. The plaintiff in error contends for this strict construction, even though the statute does not contain an express provision so limiting the right of action, claiming that such a provision is necessarily implied, for the purpose of ascertaining the status or relation of the deceased to the person alleged to have committed the wrongful act, and thereby determining what duty such person owed, if any, to the deceased.

These statutes have been variously held to be penal and remedial, and accordingly given strict and liberal constructions. But under the most liberal interpretation, implied provisions cannot be introduced into a statute where no ambiguity appears. The intention of the law-makers is to be determined from the words they employ; and, where statutes have been enacted by certain States, omitting provisions which occur in similar statutes in other States, courts have no right to presume that such omission was negligent or unintentional, especially where the language is clear and con-
880 clusive without such clauses. In such cases there is nothing to construe. Language bearing a plain import needs no ex-

tended construction. In the statutes of both Idaho and Washington the clause limiting the right of action to circumstances which would have permitted the deceased to sue is entirely omitted, and nothing appears elsewhere in the statutes to warrant its insertion by implication. The omission must therefore be considered as intentional, and the legislative will to be completely expressed without such limiting provision. The right of action given by such statutes is to the heirs or personal representatives of a person killed by the wrongful act of another, not for the injuries or damages caused to the deceased, but for the injuries and damages caused to his heirs or representatives by reason of the loss of the deceased. It cannot be dependent upon the right of the deceased to such an action if living, for it does not come into existence until his death by the wrongful act of another. It then springs into existence, by virtue of the statute, in the heirs or personal representatives, purely and simply because they have been damaged by the wrongful or negligent act of another, the relationship existing between the deceased and the party causing the death having no bearing upon the right of action other than as a circumstance to be considered in determining the degree of negligence.

In the case of Munro *v.* Dredging Co., 84 Cal. 515, the supreme court of California, in construing a similar statute to those in controversy herein, held the action given for a death caused by negligence to be a new action, and not the transfer to the representative of the right of action which the deceased person would have had if he had survived the injury.

881 The Supreme Court of the United States, in the case of Chesapeake & Ohio R. R. *v.* Dixon, 179 U. S. 131, 135, takes the same view. A statute of the State of Kentucky was there under consideration, which contained no words of limitation of the right of action given for the death of a person by negligence or wrongful act. The court said: "The cause of action thus created is independent of any right of action the deceased may have had, or would have had if he had survived the injury."

Under the statutes of both Idaho and Washington, then, the plaintiffs had a right of action against the defendant railroad company for the just damages to them resulting from the death of the said Jay H. Adams, if his death was caused by the negligence of the railroad company; and this right of action was in no way dependent upon any right existing in the deceased before his death, or which might have accrued to him had he survived.

The plaintiffs claimed that the defendant was negligent (1) in running a non-vestibuled car as a part of the train; and (2) in running the train with too great rapidity around a curve in the track. Evidence was introduced in support of these contentions showing that the train which the deceased boarded at the station of Hope was some three hours late; that the distance between Hope and the station of Sandpoint is 16 miles; that the ordinary schedule time for running between these stations was 35 minutes; that on the afternoon in question this run was made in 24 minutes. For the first

half of this distance the track is practically on a level, but contains many curves; in fact, between the 3-mile post out of Hope and the 8-mile post the outline of the track forms a figure similar to three sides of a parallelogram, with the sharp corners cut off by
882 rounding curves and the general lines being sinuous instead of straight. The engineer in charge of the engine drawing the train on that day testified that in pulling out of Hope a speed of only 20 miles an hour was attained while passing through the yards, but at about one-half mile west of Hope the speed was increased to about 35 miles an hour; that this speed was increased to 40 miles an hour, but was decreased at the Pack River trestle, a little beyond the 3-mile post, to perhaps 25 miles an hour. The trestle was about 7100 feet long. The engineer testified that about two or three hundred feet before leaving the trestle he started working steam again, and increased the speed again to 35 miles an hour, maintaining this speed until reaching the third mile from the trestle, or about 7½ miles from Hope, when the speed was again increased to about 45 miles an hour at the 10-mile post, in order to carry the train up a light grade there. From the top of the grade a speed of sixty miles an hour was gradually attained, and maintained until necessary to stop at the station of Sandpoint. The body of Mr. Adams was found at a point about 1½ miles beyond the Pack River trestle, or about 6½ miles west of Hope, where the sharpest curve of the track between Hope and Sandpoint occurs. The air-brakes were not used on approaching the curves before the accident occurred. This testimony of the engineer is not, of course, from any actual record made of the running of the train at that time, but is based upon his experience in running over that line for three years and a half.

The railway mail clerk on the train at the time of the accident, and who had been running over that line for about eight
883 months, testified that when the train had nearly passed over the Pack River trestle he noticed an unusual motion of the car, such a lurching and swinging that he could not continue with his work, but, to use his own words, "did not do a thing only hold on to keep from being knocked around the car, until I got to Sandpoint." He stated that the mail sacks piled against the side of the car fell down; that he observed the engine "talking for all she was worth," and in his judgment the train attained a speed of about 50 miles an hour immediately after leaving the trestle, and that this speed was increased to 60 miles an hour within a mile and a half from the trestle, where the accident occurred.

The news agent, who had been running on that line for over two years, also testified to the unusually high speed of the train between Pack River trestle and Sandpoint; that the shaking motion of the train over the crooked road there was so violent as to make him car sick, and he did not make his usual trip through the cars until after leaving Sandpoint, finding it too difficult to stand in the aisles. He further stated that the brakeman told him they had orders to make up a certain amount of time between Hope and Sandpoint,

and that the best thing he could do would be to sit down and hold onto the seat.

A merchant of Hope, accustomed to making the trip over this road to Spokane about twice a month, and Mr. Gabbert, the gentleman who boarded the train with the deceased on that day, both testified to the unusual lurching of the car shortly after leaving the Pack River trestle, and the high rate of speed maintained by the train until reaching Sandpoint.

The evidence of running a train at too great speed, and its permission by the railroad company's rules, is an element of
884 consideration in determining the question of negligence in a particular case (Railway Co. *v.* Dixon, 179 U. S., 131, 139), and it is of especial importance in this case in considering the advisability or necessity of providing vestibuled platforms over which passengers are permitted to pass while the cars are in motion; and whether, under the circumstances, the omission to make such provision is negligence on the part of the railroad company.

It has long been established that common carriers of passengers are bound to exercise the utmost degree of care, diligence, and skill that is practically consistent with the mode of transportation adopted; and while they are not required to employ every possible preventive which the highest scientific skill might suggest, the law requires such carriers to use the best precautions in known practical use to secure the safety of their passengers. Whether the carrier has done so or not is a question of fact, depending upon the peculiar circumstances of each case, which circumstances are to be compared and weighed by the jury, and the existence of negligence as a fact decided by them by the application of the principles of reason to such circumstances.

So in the case at bar, the question whether the defendant railroad company, having announced to the public that it was running a completely vestibuled train, and by advertisement invited the public to patronize the dining car run by it as a part of its train, thereby permitting and in fact inviting the passengers to pass over the various platforms of intervening cars while the train was in motion, was negligent in not providing such platforms with such safeguards as to make passage thereover reasonably safe at all times,
885 taking into consideration the fact that portions of the track to be passed over at a rapid speed contained sharp curves—this question was necessarily one of fact, and therefore within the province of the jury, under proper instructions from the court. The instructions given by the trial court in this regard were in accord with the established doctrine upon the duty of common carriers to passengers, and with the decision of the jury upon this question we have therefore nothing to do.

In Bronson *v.* Oakes, 76 Fed. 734; 22 C. C. A. 520, a passenger riding in the rear coach of a vestibuled train left the coach at night to go to the forward end of the train, and, to facilitate his return, left open the door of the sleeping coach in which he was riding. The night was dark, the vestibule was not lighted, and the train

was running rapidly. On his return, in passing through the vestibule which led into the coach in which he was riding, he supposed a dim, reflected light from the windows of the sleeper was a light shining through the door of the coach which he had left open, and proceeding as he supposed to enter the doorway of the coach, he walked through an outside vestibule door which had been left open, fell from the train, and was seriously injured. The court held that the question of whether the railroad company was negligent or not rested with the jury, and in commenting upon this question, said:

"The defendants were under no legal obligation to provide vestibuled trains for their passengers, but, having done so, it was their duty to maintain them in a reasonably safe condition. Railway Co. *v.* Glover (Ga.), 18 S. E. 406, 414. The purpose of the vestibuled cars is to add to the comfort, convenience, and safety of passengers, more particularly while passing from one car to another. The presence of such an appliance on a train is a proclamation by the company to the passenger that it has provided him a safe means of passing from one car to another, and an invitation for him to use it as his convenience or necessity may require. Whether, having provided vestibuled cars for their passenger trains, it was negli-
886 gence in the defendants to leave the vestibule connection between two cars without light, and the outside door of the vestibule open without a guard rail or other protection while the train was running rapidly on a dark night, is a question of fact for the jury to determine. And if, upon the facts set out in the complaint, they should find that it was negligence, no court could disturb their finding."

It is claimed by the defendant that the deceased was in the habit of traveling upon these trains, and, having knowledge of the unvestibuled tourist sleeping-car which invariably formed a part of the train, was guilty of contributory negligence in passing to and from the dining car through the unvestibuled car while the train was in motion. The deceased had the right to visit the dining car, and it was not negligence on his part to do so. He was only required to exercise ordinary and reasonable care to avoid injury. In the absence of evidence to the contrary, the law presumes that the deceased did exercise this care, and the burden of proof is then upon the defendant to show by preponderance of evidence that the deceased was guilty of contributory negligence. This was not done by direct proof, and is not inferrible from any of the facts established in the case. The testimony indicates that up to the time the deceased was last seen alive he was exercising due care in returning from the dining car to the car in which he was located for the journey. The charge of contributory negligence was therefore a question of fact to be determined by the jury in view of all the facts and circumstances of the case.

In Richmond & Danville R. R. Co. *v.* Powers, 149 U. S. 43, Mr. Justice Brewer, speaking for the court upon the question of contributory negligence, said:

"It is well settled that, where there is uncertainty as to the exist-

ence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony or because the facts being undisputed, fair-minded men will draw different conclusions from them."

887 The testimony admitted by the trial court over the objections of the defendant related to the circumstances showing the probable cause of death of Adams, and to the pecuniary loss sustained by the plaintiffs in that event. These objections do not, in our opinion, present any question involving reversible error, and are not of a character to call for discussion.

The judgment is affirmed.

(Endorsed:) Opinion. Filed May 19, 1902. F. D. Monekton, clerk.

888 United States Circuit Court of Appeals for the Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff in Error,
vs.
LOUISE H. ADAMS and FRANK ELI ADAMS, Defendant in Error. } No. 707.

In error to the circuit court of the United States for the district of Washington, eastern division.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Washington, eastern division, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed, with costs.

(Endorsed:) Judgment. Filed and entered May 19, 1902. F. D. Monekton, clerk.

889 United States Circuit Court of Appeals for the Ninth Circuit.

THE NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff in Error,
vs.
LOUISE H. ADAMS and FRANK ELI ADAMS, Defendants in Error. } No. 707.

Certificate of Clerk U. S. C. C. A. to Transcript.

I, Frank D. Monekton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing eight hundred and eighty-eight (888) pages, numbered from one (1) to eight

hundred and eighty-eight (888), inclusive, comprised in the preceding two (2) volumes, numbered one (1) and two (2), respectively, to be a full, true and correct copy of the record and of all proceedings in the above entitled case in said United States circuit court of appeals for the ninth circuit as the same appear of record in my office.

F. D. M. By M. S.

Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 20th day of May, A. D. 1902.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

890 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the ninth circuit, Greeting:

Being informed that there is now pending before you a suit in which Northern Pacific Railway Company is plaintiff in error and Louise H. Adams and Frank H. Adams are defendants in error which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the district of Washington, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme

891 Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 28th day of October, in the year of our Lord one thousand nine hundred and two.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

892 [Endorsed:] File No. 18,694. Supreme Court of the United States. No. 466, October term, 1902 Northern Pacific Railway Co., vs. Louise H. Adams & Frank H. Adams. Writ of certiorari. File No. 707. U. S. circuit court of appeals, for the ninth circuit Filed Nov. 3 1902 F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

Being informed that the honorable the Supreme Court of the United States, by its order entered January 19, 1903, in the within entitled cause, granted the petitioner's motion that the transcript of record heretofore filed therein with the petition for the writ of certiorari be taken as a return to the within writ:

Therefore, on behalf of the honorable the judges of the United States circuit court of appeals for the ninth circuit, I do hereby return the within writ to the Supreme Court of the United States, and transmit therewith the following-named original exhibits heretofore received by me and used upon the hearing of the cause, viz: Plaintiffs' Exhibits, "6A," "B," "C," "C2," "B1," (2d trial), and "R:" Defendant's Exhibits, "1" (2d trial), "3A" and "4."

Attest my hand and the seal of the said the United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 12th day of February, A. D. 1903.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

893 [Endorsed:] File No. 18,694. Supreme Court U. S. October term, 1902. Term No. 466. Northern Pacific Railway Co. petitioner *vs.* Louise H. Adams *et al.* Writ of certiorari and return. Filed Feb'y 19", 1903.

Supreme Court of the United States.

OCTOBER TERM, 1902.

NORTHERN PACIFIC RAILWAY COMPANY,
Petitioner,

vs.

LOUISE H. ADAMS AND FRANK H. ADAMS.

Petition for Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit.

To the Honorable the Supreme Court of the United States:

The petition of the Northern Pacific Railway Company respectfully shows to this Honorable Court as follows:

Louise H. Adams, widow, and Frank H. Adams, son, of J. H. Adams, deceased, seek in this action to recover damages against the Northern Pacific

Railway Company for the death of J. H. Adams. The action was brought in the Circuit Court for the District of Washington, the jurisdiction of which court was based on diverse citizenship.

The trial resulted in a verdict for the plaintiffs below and judgment for $14,000 was entered on the verdict December 14, 1900 (Transcript, p. 80). Upon the pleadings and a bill of exceptions duly settled, the case was taken by writ of error to the Circuit Court of Appeals for the Ninth Circuit, which court on May 19, 1902, affirmed the judgment.

The death occurred in the state of Idaho, and *though no statute of that state was pleaded or introduced in evidence,* it is sought to sustain the recovery by a statute of that state reading as follows:

> "When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

The grounds of negligence relied on were two.

(a) That the defendant (this petitioner) having accepted the deceased as a passenger on its west bound train at Hope, in the state of Idaho, ran the train at so high a rate of speed around curves as to throw the deceased off a platform while he was passing from one car to another.

(b) That one of the cars in the train was provided with no vestibule, the remainder of the train being vestibuled, whereas it was alleged that the railway company had advertised the train as a vestibuled train.

The petitioner, besides denying negligence in either of the particulars alleged, set up a further defense that the deceased was, and for a long time had been, the attorney of various railway companies (but not of the petitioner) and was a *gratuitous* passenger, traveling on a free pass issued to him as such, endorsed on which was the following contract executed by him.

"CONDITIONS."

"This free ticket is not transferable, and, if presented by another person than the individual named thereon, or if any alteration, addition or erasure is made upon it, it is forfeited, and the conductor will take it up and collect full fare.

"The person accepting this free ticket agrees that the Northern Pacific Railway Company shall not be liable, under any circumstances, whether of negligence of agents or otherwise, for any injury to the person, or for any loss or damage to the property, of the passenger using the same.

"I accept the above conditions.

"JAY. H. ADAMS."

"This pass will not be honored unless signed in ink by the person for whom issued."

The trial court on motion and demurrer struck out the portion of the answer last referred to, holding that, while the contract on the pass made in the state of Washington where the action was brought

and where such contracts had been held binding (*Muldoon v. Seattle City Ry.*, 7 Wash. 528) might have bound the deceased as to any damages *he* might have sustained from personal injury, it could not bind his widow and son with respect to the damages *they* claim under the statute.

With respect to the alleged negligence of the railway company which is claimed to have been the cause of death, the essential facts are as follows:

The deceased had lived for many years in Spokane, state of Washington; had been a lawyer by profession and the attorney of several railway companies; in the trial of cases and in other work for these companies he had traveled much of his time on petitioner's railway, and on other railways in that section; he was very familiar with such travel.

On November 13, 1898, he, with a friend, went on a Northern Pacific train from Spokane to Hope, Idaho, about 85 miles distant, on the main line of the Northern Pacific road; after remaining several hours at Hope, they returned on the west bound overland train, which was about 3 hours late; deceased and his friend went into the train together. It is an established and uncontradicted fact that they got onto the train by one of the unvestibuled platforms (Transcript, pp. 98, 494). They went forward into the smoking car.

The train consisted of an engine and 8 cars, in the following order, viz., engine, mail, baggage, express, smoking car, day coach, tourist sleeper, dining car, standard Pullman sleeper (Transcript, p. 386).

All the cars in this train were vestibuled, except the one known as a "tourist sleeper," placed immediately in front of the dining car, which was not so equipped, but had open platforms like an ordinary passenger coach; that is, with hand-railings running along the end of the body of the car and end of the platform down to the steps and about 2½ or 3 feet high (Transcript, p. 86).

Shortly after leaving Hope, Mr. Adams rose from his seat in the smoking car, leaving his overcoat, and said he was going back to the dining car for some cigars (Transcript, p. 91). His friend never saw him afterwards. The testimony, however, shows, and it is not questioned, that Mr. Adams passed toward the rear end of the train, through the day coach and through the tourist sleeper, across the open platforms thereon and in to the dining car (Transcript, p. 481). After buying some cigars in that car Mr. Adams went forward; at this time the train was going at a fairly good speed over a track with many curves (Transcript, pp. 482-3) and Mr. Adams is shown to have had difficulty in keeping his balance in the aisles of the car (Transcript, pp. 481, 484). After this no one is shown to have seen him before his death. His body was found the next day opposite a curve in the railroad track and about 35 or 40 feet therefrom, at a point about 6½ miles west of Hope. His body when found was mutilated in a manner which indicated quite clearly that he had fallen from the train.

Your petitioner contends that the speed of the train was ordinary, such as was frequently and

customarily made over this portion of the road (Transcript, pp. [illegible]).

One of the grounds on which the jury was allowed by the charge of the trial court to render verdict against your petitioner was, the want of a vestibule on the car in question. Vestibules strengthen a car (Transcript, p. 546); are aids in preventing telescoping (Transcript, p. 561); they keep the cars warmer in winter (Transcript, p. 564) and make passage from one car to another more comfortable, protecting it from the elements and from cinders, sparks and dust. As one of the witnesses said, they would make crossing the platform safer for a child or decrepit person (Transcript, 601). The vestibule appliance makes a train more attractive in appearance and more comfortable. It is highly advertised, relieves some dangers and increases others (Transcript, pp. 616, 624). The vestibule is a comparatively new device, having been in more or less general use since 1892 (Transcript, p. 571). But the record shows that in 1898 the percentage of vestibuled passenger equipment on different prominent systems of the country was very small, and that generally unvestibuled cars were placed, when convenience or necessity, in almost all passenger trains.

On your petitioner's road one to three or more unvestibuled coaches had for many years been run daily and had been placed in the train just ahead of the dining car (Transcript, p. 382). It is undisputed that Mr. Adams had, for a number of years prior to his death, traveled a great deal on

the Northern Pacific road and other roads, and that probably every one of the Northern Pacific trains on which he had traveled had had one or more unvestibuled cars (Transcript, p. 653).

The record shows that the deceased boarded the train on an unvestibuled platform, and in going back to the dining car passed over two such platforms, one on each end of the tourist sleeper. This established the fact of his knowledge of their character, it being broad daylight, and consequently the court instructed the jury that he *must have known thereof* (Transcript, p. 820).

By the charge of the court the jury was allowed to find your petitioner negligent either (a) with respect to the speed of this train or (b) with respect to the unvestibuled character of the tourist car platform.

Your petitioner insists that the case should not have been allowed to go to the jury on either ground, and further, that because of the contract made between deceased and the railway company upon which he was being carried at the time, his heirs cannot maintain this action.

Your petitioner has no right of appeal or writ of error herein to this honorable court, because the jurisdiction of the Circuit Court depended entirely on diverse citizenship. The Circuit Court of Appeals stayed its mandate until the third Monday of October to give time for the presentation and determination of this petition. Your petitioner presents herewith as a part of this petition a brief showing more fully its views upon the questions in-

volved and a transcript of the record in the Circuit Court of Appeals.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said court of appeals in this case, which was entitled in that court "Northern Pacific Railway Company, plaintiff in error, v. Louise H. Adams and Frank H. Adams, defendants in error," to the end that said cause may be reviewed and determined by this court as provided by law, and that your petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate; and that the said judgment of the said Circuit Court of Appeals may be reversed by this honorable court.

NORTHERN PACIFIC RAILWAY COMPANY,
By C. W. BUNN,
Attorney.

BRIEF.

I.

Deceased was riding on a pass issued to him as a gratuity, and not upon any valuable consideration.

Endorsed upon this free ticket was a contract, *executed by the deceased,* reading

> "The person accepting this free ticket agrees that the Northern Pacific Railway Company shall not be liable, under any circumstances, whether of negligence of agents or otherwise, for any injury to the person, or for any loss or damage to the property, of the passenger using the same."

The action cannot be maintained except upon the following statute of Idaho, which was not pleaded or introduced in evidence:

> "When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

The pass was delivered to deceased in the state of Washington where he resided, and the contract

on the back of it must doubtless be regarded as having been entered into in that state, and must be governed as to its validity and effect by the law of that state.

The learned district judge before whom the case was tried did not hold that this contract was invalid. Without questioning its binding force he held (Transcript, pp. 41-44) that the contract of the *deceased* could have no effect upon a right secured by statute to his heirs. It was said that they sue, not in right of the deceased, but upon a statute which gives them a new and original right not derived from the deceased or dependent on his acts; that they were not parties to the contract and cannot be bound by it.

Throughout the trial every effort of the defendant to show the *status* of the deceased—his relation to the defendant, the measure of duty owing him by the defendant—was overruled, and the trial judge finally told the jury that they *were not to consider what duty the railway company owed to the deceased* (Transcript, p. 812).

The Court of Appeals affirms this view and also adds another, viz.: *that the pass contract cannot be construed as including personal injury resulting in death.* Because, as the court says in its opinion (Transcript, p. 877) (a) "A man's life is not his own to be disposed of by contract. A man may not barter away his life, or his freedom, or his substantial rights." * * * "The expressed permission by the deceased, therefore, that the railroad company might negligently take his life without conse-

quent liability would have been in violation of both the common and statute law, and a void contract." (b) The contract does not extend to "death" because it says "injury to the person," which the learned court says presumes a continuation of life (Transcript, pp. 877-8).

(A) Let us consider first the proposition that the statutory cause of action cannot be affected by any act or contract of the deceased. This view is certainly novel and the question is of such general importance as to warrant us in expecting that this court will order the record certified.

Lord Campbell's act gives a right of action for death "in case the wrongful act or neglect or default was such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof." This language or equivalent has been incorporated into the statutes of most of the states, but has been omitted, we believe, in the statutes of Connecticut, California, Georgia, Iowa, New Hampshire, Pennsylvania, Kentucky, Idaho, North Dakota and Washington.

The omission of this express condition is what the court below relies on in saying that it cannot be implied. The question is of importance in the ten states above mentioned. The general rule applied to our American statutes following Lord Campbell's act has been, that though varying in terms they are intended to accomplish the same result and are to be construed alike. In respect to damages for ex-

ample they vary widely. The California, Idaho and Washington statutes differ from most and say that a jury may give such damages as shall under all the circumstances of the case be just. Yet it has been held that in negligence cases they were to be confined like Lord Campbell's act, to pecuniary damages (*Munro v. Dredging Co.*, 84 Cal. 515, 527; *Klepsch v. Donald*, 4 Wash., 436, 444). Mr. Tiffany in his book "Death by Wrongful Act." sec. 63, calls attention to the fact that this condition has not been expressed in the statutes of several states and says that no case has been found in which it has not been implied.

No doubt the general rule of law (*The Stella* L. R. Probate Div. 1900, 161) and the general rule of justice is, that no action can be maintained by heirs or representatives where the deceased could not have sued. Judge Hanford in his opinion (Transcript, pp. 43-4) concedes this to be the rule where the suit is brought by the "representatives" of deceased, but denies it where the suit is brought by the "heirs." Now the statute of Idaho says the suit may be brought by "his heirs *or* personal representatives." *And whether brought by the one or the other the cause of action is the same* —founded on and created by the same statute. Is it not absurd to say, that if these plaintiffs had sued as "executors" their cause of action would have been of essentially a different nature from the cause of action in this case where they sue as "heirs?" The fact that the statute gives the right to sue to the "personal representatives" of the deceased, *or* to his

"heirs," is a plain implication that the action can be maintained only where the deceased might have recovered.

The defense here is that the deceased assumed the risks—that he was not a passenger—that as to him the defendant was not bound to exercise that *highest* degree of care which a common carrier owes to its passengers. The learned district judge was forced by the logic of his ruling into what seems to us a *reductio ad absurdum*, viz.: that the jury *could not consider what duty the railway company owed to deceased* (Transcript, p. 812).

The statute in question requires the act of defendant to be "wrongful." What is wrongful? Evidently legally wrongful. Consisting of facts which the law defines as a legal wrong—such as give rise to a legal liability. If the deceased assumed the risk, if he released the defendant from liability, if by valid contract he arranged for a different degree of care from that required by the common law, then the defendant's act may not have been "wrongful." The statute evidently means *wrongful as respects the deceased.*

The statute requires either wrongful act or *"neglect."* What is neglect? Evidently a lack of that degree of care of which the *deceased* was entitled to the benefit, under all the circumstances of the case, as *between him and the defendant.*

What follows from a different view? Certainly it follows that contributory negligence of the deceased would be no defense; nor would it be a defense that he was a fellow servant with him by

whose negligence he was injured; nor would it exempt the defendant that he had as a servant, or otherwise, assumed risks, and was injured by one of the risks assumed. It follows also from the view of the lower court that deceased could have given no release had he survived, and also that had he survived, sued and recovered damages for his injury and then died, his recovery would have been no bar to this action.

But contributory negligence has been held a good defense even under statutes like the one in question not containing the express condition of Lord Campbell's act above quoted (*Quinn v. N. Y. N. H. & H. R. R. Co.*, 56 Conn. 44; *Lane Adm'r v. Cent. Iowa R. R. Co.*, 69 Iowa, 443; cases cited in note to sec. 66 Tiffany).

The Circuit Court of Appeals cites in support of its conclusion *Munro v. Dredging Co.*, 84 Cal., 515, and *Chesapeake & Ohio R. R. v. Dixon*, 179 U. S., 131. In the first case the question was simply whether the damages were part of the estate of deceased subject to his debts. It was held they were *not*, which is according to the general rule under all the statutes. No question touching or relating to the one here raised was involved in the case cited from 179 U. S. Neither decision touches the matter in hand in the remotest degree.

(B) The Circuit Court of Appeals says that a contract modifying the ordinary liability *"for any injury to the person"* does not cover injuries to the person resulting in death. But certainly "any in-

jury to the person" means all injuries regardless of result. The deceased died from an injury to the person which was within the terms of this contract.

And suppose we admit, that the deceased was not contracting and could not contract with respect to the statutory right of action given his representatives or heirs by statute, we are still thrown back on the question first discussed, viz: whether the statute gives any action where the deceased could not have maintained one.

The court further says that "A man cannot barter away his life, his freedom or his substantial rights." This is a mere glittering generality and radically unsound if taken broadly and literally. As applied by the court it is in conflict with the decision of this court in *Baltimore & Ohio R. R. Co. v. Voigt*, 176 U. S., 498. And if granted the question still remains, whether the statute gives any right to maintain an action for death where the deceased could not have recovered had he survived.

(C) That the contract of the deceased was binding on him—that a man may lawfully contract with a carrier to ride on its trains at his own risk—is well settled by the authorities. In the case of Voigt above cited, p. 513, the distinction was drawn between cases like *Railroad Co. v. Lockwood*, 17 Wall., 357, where the dispensation from liability for injuries was made a condition of transportation which the passenger had a right to demand and which the carrier was under a legal duty to furnish, and cases where one is on a train not by virtue of

any *right* but solely because of and under a special contract entered into as a condition of the carriage.

This case is like the Voigt case. The deceased for a valuable consideration, without compulsion, by fair contract well understood and signed by him, assumed the risk of traveling, agreed that as to him the company was not bound for the neglect of its servants, as a carrier is bound. Gratuitous carriage was a valuable consideration for the agreement. In the case of Voigt this court cites with approval many decisions holding such contracts valid. And these cases are a sufficient answer to the position of the court below that a man cannot barter away his life, freedom or substantial rights. The doctrine is analagous to the rule which holds it competent for an employe to assume the risks of the service including the negligence of fellow servants.

The contract was made in the state of Washington and made in view of the decisions of the highest court in that state holding it valid (*Muldoon v. Seattle City Ry. Co.*, 7 Wash., 528, s. c. 10 Wash., 311). Neither of the lower courts holds that the contract is other than binding on the *deceased* and the point really comes down to this—whether the plaintiffs can sue although the deceased could not.

The case of *Clark v. Geer*, 86 Fed. Rep., 447, cited by the Circuit Court of Appeals is not in point. That case involved the question, whether a certain contract *limiting the damages to be claimed by the deceased* in case of personal injury could be construed to *fix the damages* to be recovered for his death.

II.

The case was submitted to the jury with the instruction that they might find the company negligent in either one of two particulars: (a) with respect of the speed of the train; (b) with respect of its equipment—that is, because one car in the train, the tourist sleeper, was not vestibuled.

The general facts in regard to the arrangement and equipment of the cars are sufficiently stated in the petition for certiorari herewith filed, and we think need not be repeated. The Circuit Court of Appeals in its opinion falls into some errors of fact. At p. 874 Transcript, that court says: "The tourist sleeper was not only not vestibuled, but had no device whatever for enclosing its platforms or guarding persons who might be upon the same." The record shows that the open platform car was provided with those safeguards in customary use on such cars—that is, hand railings running along the end of the body of the car and the end of the platform down to the steps and about two or three feet above the floor (Transcript, p. 86). The court again says on the same page that the deceased with his friend boarded the train at either the rear end of the smoking car or the front platform of the adjoining first class coach, and proceeded immediately forward into the smoking car, where they took their seats. The evidence shows that they entered the train by one of the unvestibuled platforms

which *must* have been at one end or the other of the *tourist* car (Transcript, p. 494). The trial court instructed the jury that this was true, and that therefore the deceased must be taken to have known the unvestibuled condition of that car (Transcript, p. 820). The court says (Transcript, p. 881) that the ordinary schedule running time between these stations (Hope and Sand Point) was thirty-five minutes. This is an error. The court probably refers to a certain time card introduced in evidence and in force at the date of the accident which showed thirty-five minutes. But this statement is misleading. The "ordinary" time was much faster. Time card summer 1896, twenty-five minutes (Transcript, p. 327). Many other cards twenty-five, twenty-seven, twenty-eight minutes (Transcript, p. 349). The engineer of this train had made the run as fast as nineteen minutes (Transcript, p. 328) and often in 21 minutes (Transcript, p. 328) and with no unusual lurch (Transcript, p. 328). He had run over the same curve where deceased is supposed to have been thrown off more than three hundred times at a faster rate (Transcript, p. 361). On this day he was making just about usual time (Transcript, p. 357).

It is impossible to have a straight track through a mountain country and there is no pretense that the track was improperly or negligently located or built. There is no pretense that any accident happened to this train or had ever happened to any other train. There is no pretense that it was pos-

sible for the company to have built a straight track through the country in question. The best evidence that the track was properly built and the train properly run is that the trip was made in safety. No passenger suffered any injury except the deceased.

With respect to the *speed of the train* the verdict rests on the most slimsy foundation and cannot be sustained, unless it is to be held that trains must be run according to the varying ideas of a thousand juries.

So far as the *unvestibuled character of the tourist sleeper* is concerned the facts are also briefly but sufficiently stated in the petition for certiorari. They cannot, we think, be distinguished from the facts involved in *Sansom v. Southern Ry. Co.*, Circuit Court of Appeals, 6th Cir., 111 Fed. Rep., 887. In that case the decision was directly the reverse of that in the case at bar. This is, as we understand it, sufficient ground for granting the writ under the ordinary practice of this court. The Sansom case was cited to the Circuit Court of Appeals in this case, but is not referred to in the court's opinion.

As the court well said in the Sansom case, if the deceased had been assured by the advertisements of the railway company that this was a completely vestibuled train, and if he relied on such statement and was injured by his reliance thereon, he might perhaps recover. But in the case at bar, not only was the train a daylight train as in the Sansom case and the want of the vestibule plainly visible,

but it was affirmatively proved and charged by the trial court that the deceased had passed over the unverifiable platforms at least twice and must be conclusively presumed to have known their condition.

III.

As before stated, the deceased knew of the unverifiable condition of the two platforms on the tourist sleeper, and the trial court told the jury that they must regard him as having had such knowledge. On the plainest and best settled principles, having such knowledge, he was bound in attempting to cross the platforms to act with reference thereto, and he must be held to have assumed the risk incident to the unverifiable character of the platforms; notwithstanding which the trial court submitted it to the jury to find that the company was negligent with respect to the construction of these platforms; and the Circuit Court of Appeals so far failed to apprehend the defendant's position as to say (Transcript, p. 8[illegible]) our claim was that he was guilty of contributory negligence in passing over the platforms. No such proposition was made in the court below or will be asserted here. Whatever may be said of the speed of the train, so far as the unverifiable condition of the platforms is concerned the case is plain one of risk assumed by the deceased. It cannot be known upon which point the verdict was based.

Doubtless both the lower courts were led into treating this as a fact of no account because of their view on the first question discussed. Indeed if it is true that any contract or act of the deceased could not bar this action by his heirs, and if, as the trial court charged, the jury could not consider what duty the railway company owed to the deceased, this action might be maintained although the damage occurred from risk assumed by the deceased. This was clearly the theory on which this case was tried. It is a striking and startling illustration of the error which we have endeavored to make plain under the first head of this brief. Supposing the deceased had been an employe and had been killed by one of the ordinary risks of the employment—by the negligence of fellow servants, for example, or by some imperfect tool or appliance the imperfection of which was fully known to him—could his heirs or representatives recover? To assert that they could is a proposition, to say the least of it, so novel, so important and so contrary to general rules, as to bring the case within the category of those which this court will order certified from the Circuit Court of Appeals.

IV.

Finally, it should be understood that the verdict is based on pure speculation with respect to the corpus of this matter—the cause of death. No one assumes to testify how or why the deceased came to fall from the train. We do not know whether

he was seized with a sudden fit of illness, whether he stubbed his toe and fell down, whether he was using to the best of his ability the hand railings which were on both sides of the platform, whether the case is one of suicide, or carelessness. We deem it unnecessary to more than suggest these questions at this stage of the case, but if the record is certified we shall insist that a verdict cannot be rendered as this one was, based upon guess-work and speculation as to the essential and central fact involved.

We beg to remind the court, in conclusion, that the mandate of the Circuit Court of Appeals has been stayed only until the third Monday in October, and we trust that an announcement will be made on this petition on or before that day.

C. W. BUNN,
Of Counsel for Petitioner.

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 143.

NORTHERN PACIFIC RAILWAY COMPANY
Petitioner,

vs.

LOUISE H. ADAMS AND FRANK H. ADAMS.

STATEMENT.

Louise H. Adams, widow, and Frank H. Adams, son, of J. H. Adams, deceased, in this action recovered damages against the Northern Pacific Railway Company for the death of J. H. Adams. The action was brought in the Circuit Court for the District of Washington, the jurisdiction of which court was based on diverse citizenship.

The trial resulted in a verdict for the plaintiffs below and judgment for $14,000 was entered on the verdict (Transcript, p. 41). Upon the pleadings and a bill of exceptions duly settled, the case was

taken by writ of error to the Circuit Court of Appeals for the Ninth Circuit, which court affirmed the judgment. This court granted a writ of certiorari.

The death occurred in the State of Idaho and it is sought to sustain the recovery by a statute of that State reading as follows:

> "When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

The grounds of negligence relied on were two.

(a) That the defendant (this petitioner) having accepted deceased as a passenger, ran the train at so high a rate of speed around curves as to throw him off a platform while he was passing from one car to another.

(b) That one car in the train was provided with no vestibule, the remainder of the cars being vestibuled, whereas it was alleged that the railway company had advertised the train as a vestibuled train.

The defendant, besides denying negligence in either of the particulars alleged, set up a further defense (Transcript, pp. 14, 15, 16) that the deceased was, and for a long time had been, the attorney of various railway companies (but not of the

defendant) and was a *gratuitous* passenger, traveling on a free pass issued to him as such, endorsed on which was the following contract by him signed.

"CONDITIONS."

"This free ticket is not transferable, and, if presented by another person than the individual named thereon, or if any alteration, addition or erasure is made upon it, it is forfeited, and the conductor will take it up and collect full fare.

"The person accepting this free ticket agrees that the Northern Pacific Railway Company shall not be liable, under any circumstances, whether of negligence of agents or otherwise, for any injury to the person, or for any loss or damage to the property, of the passenger using the same.

"I accept the above conditions.

"JAY. H. ADAMS."

"This pass will not be honored unless signed in ink by the person for whom issued."

The trial court on motion and demurrer struck out the portion of the answer last referred to, holding that, while the contract made in the State of Washington where the action was brought and where such contracts had been held binding (*Muldoon v. Seattle City Ry.*, 7 Wash. 528) might have bound the deceased as to any damages *he* might have sustained from personal injury, it could not bind his heirs with respect to the damages *they* claim under the statute (Transcript, pp. 21-23).

The essential facts as to defendant's alleged negligence are as follows:

Deceased had lived for many years in Spokane, State of Washington; had been a lawyer by profession and the attorney of several railway companies;

in the trial of cases and in other work for these companies he had traveled much of his time on defendant's railway, and on other railways in that section; he was very familiar with such travel.

On November 13, 1898, he, with a friend, went on a Northern Pacific train from Spokane to Hope, Idaho, about 85 miles distant, on the main line of the Northern Pacific road; after remaining several hours at Hope they returned on the west-bound overland train, which was about three hours late; deceased and his friend went into the train together. It seems probable that they entered the train by one of the unvestibuled platforms (Transcript, pp. 50-51, 276). They went forward into the smoking car.

The train consisted of an engine and eight cars, in the following order, viz: engine, mail, baggage, express, smoking car, day coach, tourist sleeper, dining car, standard Pullman sleeper (Transcript, p. 215).

All the cars were vestibuled, except the "tourist sleeper," immediately in front of the dining car. It had open platforms like an ordinary passenger coach; that is, with hand railings running along the end of the body of the car and end of the platform down to the steps and about 2½ or 3 feet high (Transcript, pp. 43-44).

Shortly after leaving Hope, Mr. Adams rose from his seat in the smoking car, leaving his overcoat, and said he was going back to the dining car for some cigars (Transcript, p. 46). His friend never saw him afterwards. The testimony, however,

shows, and it is not questioned, that Mr. Adams passed toward the rear end of the train, through the day coach and through the tourist sleeper, across the open platforms thereon and into the dining car (Transcript, pp. 268-9). After buying some cigars in that car Mr. Adams went forward; at this time the train was going at a fairly good speed over a crooked piece of track (Transcript, pp. 269-270) and Mr. Adams is shown to have had difficulty in keeping his balance in the aisles of the car (Transcript, pp. 269, 270, 271). After this, so far as is known, no one saw him before his death. His body was found the next day opposite a curve in the railroad track and some distance therefrom, at a point about 6½ miles west of Hope. His body when found was mutilated in a manner which indicated quite clearly that he had fallen from the train.

There was no *evidence* whatever to prove that Mr. Adams was *thrown off the platform by the lurching of the train* while carefully passing from one car to another. For aught that appears it may have been a case of suicide, or of sudden illness; or Mr. Adams may have stumbled and fallen, or may have been riding on the platform; or the accident may have been the result of his own want of care in not using the iron rails or hand-holds.

That deceased boarded the train upon an unvestibuled platform is questioned by plaintiffs' counsel. Whether he did or not is immaterial, because he had traveled over, while the train was in motion, both the unvestibuled platforms in going back to the dining car. And the trial court properly charg-

of the jury that Mr. Adams must have known these platforms were unventilated (Transcript, p. 460).

The trial court charged the jury that they might find the petitioner liable because either of the speed of the train or the lack of a vestibule (Transcript, p. 456). It cannot be determined therefore upon which of these grounds the verdict rests.

Assignment of Errors

Errors are assigned in the record (Transcript, pp. 465-470). The errors here relied on may be thus summarized:

1. The court erred in submitting to the jury the speed of the train as a ground of defendant's liability.

2. The court erred in submitting to the jury the unventilated condition of the cross car platforms as a ground of defendant's liability.

3. The court erred in allowing the jury to find without evidence that the cause of the death was either the speed of the train or the want of ventilation.

4. The court erred in ruling that the contract on the back of the pass exempting defendant from liability was inapplicable to this case. And

Herein that the court erred in charging (Transcript, p. 456):

"You are not to consider what was the duty

of this carrier toward Mr. Adams who was killed, but the duty which the defendant owed to these plaintiffs (his heirs); and the duty which they have the right to exact from the defendant in this case is the same duty which the defendant company owed to the public in general."

5. The court erred in refusing the request that a verdict be directed for defendant (Transcript, p. 463).

ARGUMENT.

I.

As to the *speed of the train* the verdict rests on the most flimsy foundation and cannot be sustained, unless it is to be held that trains must be run at speeds to suit the varying ideas of juries.

True, there was some testimony of considerable swinging and lurching of the train. But the train ran and arrived safely. No accident occurred to it, or so far as appears, had ever happened to any other train upon this section of road, though faster time was often made. A straight track cannot be built through a mountainous country, and there is no charge that this track was negligently located or built. The lurch and swing of trains around curves is one of the ordinary things universally experienced upon all but a few unusually straight tracks. A high speed is customarily maintained upon curves,

safety being provided for by elevation of the outer rail. Upon the curve in question this elevation was a slight fraction under six inches.

The distance Hope to the next stop, Sand Point, sixteen miles, was run by this train in twenty-four minutes, an average of forty miles per hour (Transcript, p. 181). The learned Circuit Court of Appeals falls into an error in saying (Transcript, p. 492) that the *ordinary* schedule between these stations was thirty-five minutes. This, it is true, was the then schedule for that train, but other schedules had been ordinarily faster; time card, summer 1896, 25 minutes (Transcript, p. 181); many other cards 25, 27 and 28 minutes (Transcript, p. 193). The engineer of this train had made the run as fast as 19 minutes (Transcript, p. 182), often in 21 minutes (Transcript, p. 182), with no unusual lurch. He had run over the particular curve where it is said deceased was thrown off more than a hundred times at a faster rate than on the day in question (Transcript, p. 200).

Though the train and its passengers (except Mr. Adams) passed over safely, and though several witnesses noticed no unusual motion, and though there is no evidence that any unusual lurch of the train really threw Mr. Adams off, or that he was in the exercise of proper care, yet because the mail bags were tipped over in the mail car and the newsboy was car sick, the speed of this train was submitted as one of the grounds of defendant's liability to the opinion of twelve jurymen, none of whom presum-

ably knew the slightest thing of running railway trains.

II.

The *want of vestibules* on the platforms of the tourist sleeping car was improperly submitted to the jury as a ground of liability (Instructions marked (22) and (29), Transcript, pp. 455, 456, 464).

As before stated, it is probably the fact that the deceased boarded the train by one of these unvestibuled platforms. At any rate it is not disputed that in going for cigars from the smoking car to the dining car he passed while the train was in motion over both open platforms. It was broad daylight and the rush of sound and wind must have forced his attention to the open character of the platforms. The trial court charged that he must be presumed to have known of them and to have acted with perfect knowledge of the fact (Transcript, p. 460).

He was not forced or urged to cross these platforms. He crossed them first to get cigars, and attempted to go back over them apparently to smoke them. No duty, no imperative business, no stress of circumstances, forced him to do so. He was at perfect liberty to wait until the train stopped or was moving slowly. It appears in evidence that Mr. Adams had some difficulty in keeping his balance in the aisles of the dining car, owing to the motion of

the train around curves. And he *voluntarily*, with full knowledge of all the conditions, undertook to pass over the open platforms.

It is a principle of law too plain to need discussion that he assumed the risk incident to the open character of the platforms; notwithstanding which the trial court submitted to the jury to find the defendant liable by reason of their open character; and the Circuit Court of Appeals so far failed to apprehend the point as to say (Transcript, p. 495) that we claimed *contributory negligence* on Mr. Adams' part in passing to and from the dining car while the train was in motion. No such proposition was asserted in that court, or will be asserted here. But we do assert that when deceased voluntarily, with full knowledge of all the conditions, attempted to cross the platforms, he assumed whatever element of risk was incident to their open condition.

The case cannot, we think, be distinguished from *Sansom v. Southern Ry. Co.*, 50 C. C. A., 53. In that case the decision was directly the reverse of that in the case at bar.

As the court well said in the *Sansom case*, if the deceased had been assured by the advertisements of the railway company that the train was completely vestibuled, and if, relying on such statement, he failed to take those precautions which he otherwise would have taken, and was for that reason injured, he might recover. But the obvious character of the risk and Mr. Adams' complete knowledge of it, show that he was not deceived or lulled into security

by the defendant's advertisements, or by any false appearance.

The record contains some interesting testimony upon vestibules, their purpose and use, which, for *the reasons before stated*, we apprehend is immaterial, but in passing it may not be out of place to allude to it. The witnesses were, Henry R. Williams, General Manager Chicago, Milwaukee & St. Paul Railway Company; Charles A. Goodnow, Assistant General Superintendent of the same company; A. B. Newell, Superintendent Western Division Lake Shore & Michigan Southern Railway Company; A. J. Hitt, General Superintendent Chicago, Rock Island & Pacific Railway Company; A. W. Sullivan, General Superintendent Illinois Central Railroad Company, and W. C. Brown, General Manager Chicago, Burlington & Quincy Railroad Company. This evidence is contained, pages 293 to 360, inclusive, of the transcript. Its sum and substance is, that vestibules were not invented and are not used for the purpose of preventing passengers from being thrown off a platform by the motion of the train. They are aids in preventing telescoping of cars in case of wreck, they assist in keeping the cars warm in winter, they make passage from one car to another more comfortable, protecting from rain, snow, cinders, sparks and dust, they make a train more attractive in appearance and more comfortable. These witnesses all admit that while they make crossing a platform safer for a child or decrepid person, this was not the reason of their introduction, and that passage from one car

to another over open platforms has never been regarded as unsafe for any person in the full possession of his faculties and in the exercise of reasonable care. This testimony also shows conclusively that in 1898, upon all the railroads of the country, the percentage of vestibuled equipment was very small, and that unvestibuled cars were commonly and habitually placed in trains otherwise vestibuled whenever that became convenient or necessary; that there was no objection to it and it was good railroad practice; that it was done when necessary upon all trains, and customarily upon all but a very few extra fare or so-called limited trains.

At the time in question the tourist sleeping cars on the defendant's railway, as well as upon other railways, had not been vestibuled. They were run by the Pullman Company generally upon all the railways, and one or more was run in each of the defendant's overland trains. They were placed just ahead of the dining car (Transcript, p. 218). Mr. Adams was a frequent traveler upon the trains of the defendant and had been for a number of years prior to his death, and every one of the main line trains upon which he had traveled had had one or more unvestibuled cars (Transcript, p. 365).

The statement of facts by the Circuit Court of Appeals (Transcript, p. 488) contains a serious error. It is there said that the tourist sleeper was "not only not vestibuled, but had no device whatever for enclosing its platforms or guarding persons who might be upon the same." The platforms had in fact hand rails of iron enclosing them completely, ex-

cept an opening required for walking to the next car, and one on each side where the steps descended. The platforms were exactly like those in customary use upon first-class unvestibuled cars (Transcript, pp. 43-4).

III.

There was, we submit, no sufficient evidence of the gist of plaintiffs' case; namely, that the real cause of Mr. Adams' death was either lurching of the train or the want of a vestibule.

The verdict rests as to this central element not upon any evidence, but upon presumption—or rather upon two presumptions.

The platforms being equipped with iron rails, intended among other things as hand holds, and they being in common experience sufficient to enable any able-bodied adult passenger to move from car to car in safety in spite of motion and lurching of the train, and nothing appearing except that the deceased fell from the car, the most improbable inference possible to be drawn is, that he was thrown off by motion while holding on to the rails to the best of his ability.

Given a train in rapid motion over a crooked piece of track, any person using ordinary care would grasp the iron rails for safely crossing an open platform. It may not be *impossible* that such a person should be thrown off the train, but it is most

highly improbable and contrary to all experience. The alleged cause of the accident is *prima facie* inconsistent with the deceased being in the exercise of care; i. e. using the hand holds. If he used them, it is difficult to see how the lurching of the train could throw him off. If he was so thrown off, it is strong proof that he was not using them.

The jury was told they should *presume* Mr. Adams was crossing the platform with due care; and they were also allowed to *presume* that a lurch of the train threw him off. The verdict therefore rests not only on *presumption*, but on *two* presumptions, which in point of fact are not consistent with each other.

We shall not discuss the burden of proof as to negligence or contributory negligence. See *Beach Contributory Negligence*, chap. XV. The ordinary rule of the Federal Courts as to contributory negligence is, that the burden is upon the defendant. But the presumption of care on the part of the plaintiff cannot be indulged where it is contrary to the proven facts or contrary to the theory on which plaintiff must establish his main contention, i. e. that the cause of his injury was defendant's negligence.

Moreover, consider whether the proofs warrant a finding that the death was caused by the roll or lurch of the train. They are as consistent with suicide, with vertigo or other sudden illness, with a stumble or other similar accident.

The case of *Reidhead v. Skagit County*, 73 Pac. Rep., 1118 (unreported), decided by the Supreme

Court of Washington, seems indistinguishable from this case.

"The definite and specific proving power of circumstantial evidence depends upon its incompatibility with, and incapability of explanation upon any reasonable hypothesis other than that of the truth of the principal fact, in proof of which it is adduced."

Wills on Circumstantial Evidence, p. 274.

"A theory cannot be said to be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such a nature, and are so related to each other, that it is the only conclusion that can fairly or reasonably be drawn from them. It is not sufficient that they be consistent, merely, with that theory, for that may be true, and yet they may have no tendency to prove the theory. This is the well-settled rule."

Asbach v. Ry. Co., 74 Ia. 248, 250;
Carruthers v. Ry. Co., 55 Kan. 600;
Wheelan v. Ry. Co., 85 Ia. 167;
Ruppert v. R. R. Co., 154 N. Y. 90.

"When the fact is that the damages claimed in an action were occasioned by one of two causes, for one of which the defendant is responsible, and the other of which it is not responsible, the plaintiff must fail if his evidence does not show that the damage was produced by the former cause. And he must fail also if it is just as probable that they were caused by the one as by the other; as the plaintiff is bound to make out his case by the preponderance of evidence. The jury must not be left to mere conjecture; and a bare possibility that the damage was caused in consequence of the negligence

and unskillfulness of the defendant, is not sufficient."

Searles v. Ry. Co., 101 N. Y. 661, 662;
Affirmed in *Grant v. Ry. Co.*, 133 N. Y. 659.

Where the evidence is equally consistent with either view—the existence or non-existence of negligence—it is not competent for the judge to leave the matter to the jury. The party who affirms negligence has failed to establish it. This is a rule which never ought to be lost sight of.

Cotton v. Wood, 8 C. B. (N. S.) 568;
Thompson on Negligence, sec. 364;
Baulec v. R. R. Co., 59 N. Y. 356;
Hayes v. Ry. Co., 97 N. Y. 259;
R. R. Co. v. Schertle 97 Pa. St. 450;
Wieland v. D. & H. Canal Co., 167 N Y. 19;
Wiwirowski v. Ry. Co., 124 N. Y. 420;
Cordell v. Ry. Co., 75 N. Y. 330;
Tyndale v. R. R. Co., 156 Mass. 503.

Conjecture cannot be allowed to supersede proof, and a jury will not be permitted to conjecture how an accident occurred.

Borden v. R. R. Co., 131 N. Y. 671;
R. R. Co. v. State, 73 Md. 74;
Quincy, etc. v. Kitts, 42 Mich. 34;
Steffen v. Ry. Co. 46 Wis. 259
Sorenson, Admr. v. Paper Co., 56 Wis. 338;
Manning v. Ry. Co., 105 Mich. 260;
Finkelston v. Ry. Co., 94 Wis. 270;
Ellison v. Receiver, &c., 49 Minn. 240;
Orth v. R. R. Co., 47 Minn. 384;
Hewitt v. R. R. Co., 67 Mich. 61.

IV.

Deceased was riding on a pass issued to him as a gratuity, and not upon any valuable consideration.

Endorsed upon this free ticket was a contract, *executed by him*, reading,

> "The person accepting this free ticket agrees that the Northern Pacific Railway Company shall not be liable, under any circumstances, whether of negligence of agents or otherwise, for any injury to the person, or for any loss or damage to the property, of the passenger using the same."

The action cannot be maintained except upon the following statute of Idaho:

> "When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

The contract on the pass was valid by the laws of Washington, where it was entered into and where Mr. Adams resided; *Muldoon v. Seattle City Ry. Co.*, 7 Wash. 528 (s. c. 10 Wash. 311). But doubtless in the Federal Courts the question is one of general law; *Liverpool &c Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 442; *Lake Shore Ry. v. Prentice*, 147

U. S. 101; *Hartford Ins. Co. v. Ry. Co.*, 175 U S. 91.

The learned District Judge before whom the case was tried did not hold that this contract was invalid. Without questioning its binding force he held (Transcript, pp. 21-23) that the contract of the *deceased* could have no effect upon a right secured by statute to his *heirs*. It was said that they sue, not in right of the deceased, but upon a statute which gives them a new and original right not derived from the deceased or dependent on his acts; that they were not parties to the contract and cannot be bound by it.

Throughout the trial every effort of the defendant to show the *status* of the deceased—his relation to the defendant—was overruled, and the trial judge finally told the jury that they *were not to consider what duty the railway company owed to the deceased, but what duty it owed to his heirs, the plaintiffs* (Transcript, p. 456).

The Court of Appeals affirms this view and also adds another, viz: *that the pass contract cannot be construed as including personal injury resulting in death*. The Court held (Transcript, p. 490) (a) "A man's life is not his own to be disposed of by contract. A man may not barter away his life, or his freedom, or his substantial rights." * * * "The expressed permission by the deceased, therefore, that the railroad company might negligently take his life without consequent liability would have been in violation of both the common and statute law, and a void contract." (b) The contract does not extend to "death" because it says "injury to the

person," which the learned court says *presumes a continuation of life.*

(A) Consider first the proposition that the statutory cause of action cannot be affected by any act or contract of the deceased. This view is certainly novel.

Lord Campbell's act gives a right of action for death "in case the wrongful act or neglect or default was such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof." This language or equivalent has been incorporated into the statutes of most of the states, but, we believe, has been omitted in the statutes of Connecticut, California, Georgia, Iowa, New Hampshire, Pennsylvania, Kentucky, Idaho, North Dakota and Washington.

The omission of this express condition is what the court below relies on in saying that it cannot be implied. The general rule applied to our American statutes following Lord Campbell's act has been, that though varying in terms they are intended to accomplish the same result and are to be construed alike. In respect to damages for example they vary widely. The California, Idaho and Washington statutes differ from most and say that a jury may give such damages as shall under all the circumstances of the case be just. Yet it has been held under those statutes that in negligence cases damages are to be confined as under Lord Campbell's act, to pecuniary

damages (*Hanover Railroad Co.*, 34 Cal. 545, 527; *Kleppe et al. Dimmick*, 52 Wash., 426, 444). Mr. Tiffany in his book "Death by Wrongful Act," sec. 43, calls attention to the fact that the condition in question has not been expressed in the statutes of several states, and says that no case has been found in which it has been implied.

No doubt the general rule of law (*The Stella* L. R. Probate Div. [1900] 161) and the general rule of justice is, that no action can be maintained by heirs or representatives where the deceased could not have sued. Judge Hanford in his opinion (Transcript, p. 27) considers this to be the rule when the suit is brought by the "representatives" of deceased, but denies it when the suit is brought by the "heirs." The Circuit Court of Appeals goes further and holds that either "heirs" or "representatives" could recover, though the deceased could not (Transcript, p. 192). The statute of this state says the suit may be brought by "his heirs or personal representatives." And whether brought by the one or the other the cause of action is the same, founded on and created by the same statute. It is not claimed by any that if these plaintiffs had sued as "executors" their cause of action would have been of essentially a different nature from the cause of action in this case where they sue as "heirs." The fact that the statute gives the right to sue to the "personal representatives" of the deceased, or to his "heirs," is a plain implication that the action can be maintained only where the deceased might have recovered.

The decisions here is that the deceased assumed the

risks—that he was not a passenger—that as to him the defendant was not bound to exercise that *highest* degree of care which a common carrier owes to its passengers. The learned District Judge was forced by the logic of his ruling into what seems to us a *reductio ad absurdum*, viz: that the jury *could not consider what duty the railway company owed to deceased.*

Where the statute in question requires the act of defendant to be "wrongful," what is meant by wrongful? Evidently *legally* wrongful. Consisting of facts which the law defines as a legal wrong—such as give rise to a legal liability. If the deceased assumed the risk, if he released the defendant from liability, if by valid contract he arranged for a different degree of care from that required by the common law, then the defendant's act may not have been "wrongful." The statute evidently means *wrongful as respects the deceased.*

The statute requires either wrongful act or "*neglect.*" What is neglect? Evidently a lack of that degree of care to which the *deceased* was entitled, under all the circumstances of the case, as *between him and the defendant.*

What follows from a different view? Certainly it follows that contributory negligence of the deceased would be no defense; nor would it be a defense that he was a fellow servant with him by whose negligence he was injured; nor would it exempt the defendant that he had as a servant, or otherwise, assumed risks, and was injured by one of the risks assumed. It follows also from the view

of the lower court that deceased could have given no release had he survived, and also that had he survived, sued and recovered damages for his injury and then died, his recovery would have been no bar to this action.

The learned trial judge having been logical up to the point of telling the jury they could not consider what duty the carrier owed to the deceased, should have followed his reasoning to its necessary result and told the jury that *contributory negligence of the deceased would not bar the action of his heirs.* But here the court became inconsistent and charged (Transcript, p. 457) that the action of the heirs would be barred by Mr. Adams' contributory negligence.

And contributory negligence has been held a good defense even under statutes like the one in question not containing the express condition of Lord Campbell's act above quoted (*Quinn v. N. Y., N. H. & H. R. R. Co.*, 56 Conn. 44; *Lane Adm'r. v. Cent. Iowa R. R. Co.*, 69 Iowa, 443; cases cited in note to sec. 66 Tiffany).

The Circuit Court of Appeals cites in support of its conclusion *Munro v. Dredging Co.*, 84 Cal., 515, and *Chesapeake & Ohio R. R. v. Dixon*, 179 U. S., 131. In the first case the question was simply whether the damages were part of the estate of deceased subject to his debts. It was held they were *not*, which is according to the general rule under all the statutes. No question touching or relating to the one here raised was involved in the case cited

from 179 U. S. Neither decision touches the matter in hand in the remotest degree.

(B) The Circuit Court of Appeals says that a contract modifying the ordinary liability *"for any injury to the person"* does not cover injuries to the person resulting in death. But certainly "any injury to the person" means all injuries regardless of result. The deceased died from an injury to the person and all injuries to the person are within the terms of this contract.

And suppose we admit, that the deceased was not contracting and could not contract with respect to the statutory right of action given his representatives or heirs by statute, we are still thrown back on the question first discussed, viz: whether the statute gives any action where the deceased could not have maintained one.

The court further says, that "A man cannot barter away his life, his freedom or his substantial rights." This is a mere glittering generality and radically unsound if taken broadly and literally. As applied by the court it is in conflict with the decision of this court in *Baltimore & Ohio R. R. Co. v. Voigt*, 176 U. S., 498. And if granted the question still remains, whether the statute gives any right to maintain an action for death where the deceased could not have recovered had he survived.

(C) That the contract was binding on the deceased—that a man may lawfully contract with a carrier to ride on its trains at his own risk—is held by the weight of authority. In the case of

Voigt above cited, p. 513, the distinction was drawn between cases like *Railroad Co. v. Lockwood*, 17 Wall., 357, where the dispensation from liability for injuries was made a condition of transportation, which the passenger had a right to demand and which the carrier was under a legal duty to furnish, and cases where one is on a train not by virtue of any *right*, but solely because of a special contract entered into as a condition of the carriage.

This case is like the *Voigt* case. The deceased for a valuable consideration, without compulsion, by fair contract well understood and signed by him, assumed the risk of traveling, agreed that as to him the company was not bound for the neglect of its servants, as a carrier is bound. Gratuitous carriage was a valuable consideration for the agreement. In the case of *Voigt* this court cites with approval many decisions holding such contracts valid.

The great weight of authority sustains the proposition that one who accepts a purely gratuitous pass can bind himself by contract to relieve the carrier from liability for personal injury, and as observed by Judge Putnam in *Duncan v. Maine Central R. R. Co.*, 113 Fed. 508, 514:

> "The result we have reached conforms the law applicable to the present issue to that moral sense which justly holds those who accept gratuities and acts of hospitality to perform the conditions on which they are granted."

The following cases fully sustain this doctrine: *Quimby v. Boston & Maine Railroad*, 150 Mass. 365; *Griswold v. New York, etc. Railroad*, 53 Conn.

371; *Muldoon v. Seattle City Ry.* (above cited); *Gulf, Colorado & Santa Fe Ry. v. McGown*, 68 Texas, 640; *Duncan v. Maine Central R. R. Co.*, 113 Fed. Rep. 508; *Rogers v. Kennebec, etc., Co.*, 86 Me. 261; *Kinney v. Central R. R. Co.*, 34 N. J. L., 513, and the recent case of *Payne v. Terre Haute & Indianapolis Ry. Co.* 157 Ind., 616, where the opinion was by Judge Baker, present United States Circuit Judge. *Roering and wife v. Chesapeake Beach Ry. Co.*, Court of Appeals, District Columbia, upon the present calendar of this court. See also article, 57 *Central Law Journal*, p. 83.

C. W. Bunn.

FILED
JAN 9 1903
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. ~~166~~ 143.

NORTHERN PACIFIC RAILWAY COMPANY,

vs.

LOUISE H. ADAMS AND FRANK H. ADAMS.

Certiorari to the Circuit Court of Appeals for the Ninth Circuit.

STATE OF MINNESOTA,
ss.
County of Ramsey.

Charles W. Bunn being duly sworn deposes and says he is counsel for the Northern Pacific Railway Company in this action; that shortly after the writ

of certiorari was allowed herein, namely, on the third day of November, 1902, deponent prepared a stipulation to the effect that the certified record now on file with the clerk of this court, which was filed with the petition for certiorari, should stand as the record herein, and that the clerk of the circuit court of appeals in making return to the writ of certiorari might return said stipulation instead of said record; deponent sent this stipulation on the third of November, 1902, to the attorneys of said railway company at Spokane, Washington, which is the residence of counsel in this case for Louise H. Adams and Frank H. Adams, asking that the stipulation be presented to said counsel with the statement that it was the ordinary practice in such cases to make such stipulations, and that the purpose thereof was to save unnecessary expense; deponent has been advised by the said attorneys of the Northern Pacific Railway Company that said stipulation was, on receipt thereof, presented to Messrs. Voorhees and Voorhees (who are attorneys of record both in the circuit court and in the circuit court of appeals of the said Louise H. Adams and Frank H. Adams) and said explanatory statement made to them, and that they declined to make such stipulation. Since then as this deponent is advised the clerk of the circuit court of appeals of the ninth circuit has also informed Messrs. Voorhees and Voorhees that the record heretofore filed in this court with the petition constituted the entire and correct record, and that a re-certification of the same would simply be a duplication, and

that it was the general practice in that circuit as well as in other circuits to make stipulations of the character submitted and requested by deponent; but said Voorhees and Voorhees have declined to make such stipulation.

Deponent paid to the clerk of the circuit court of appeals for the ninth circuit $455.40 for the certified copy now on file in this court, which he believes is the proper fee and necessary to be paid in order to obtain another certified copy of said record.

Deponent is informed that in two cases at the present term, namely, *John A. Humbird and Frederick Weyerhaeuser v. Waldo Avery, et al.*, and *United States v. Northern Pacific Railway Company, et al.*, this court has of its own motion ordered that the record filed with the petition for certiorari stand as the return to the writ.

CHARLES W. BUNN.

Subscribed and sworn to before
me this 23d day of December, 1902.

EDWIN IRLE,
Notary Public,
Ramsey County, Minnesota.

(Notarial Seal)

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 466.

NORTHERN PACIFIC RAILWAY COMPANY,

vs.

LOUISE H. ADAMS AND FRANK H. ADAMS.

To MESSRS. VOORHEES AND VOORHEES,
Attorneys for Louise H. Adams and Frank H. Adams.

You will please take notice that the undersigned will move the court on the second Monday of January, 1903, namely, January 12th, at the opening of court on that day or as soon thereafter as counsel can be heard, for an order that the certified copy of the record herein filed with the petition for certiorari stand as the return to the writ.

This motion will be based upon the record and files of the court and upon the attached affidavit of Charles W. Bunn herewith served.

Dated, December 23, 1902.

C. W. BUNN,
Counsel for Northern Pacific Railway Co.

FILE COPY.

FILED
JAN 9 1903
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States

OCTOBER TERM, 1902.

No. ~~136~~ 143

NORTHERN PACIFIC RAILWAY COMPANY

vs.

LOUISE H. ADAMS AND FRANK H. ADAMS.

Certiorari to the Circuit Court of Appeals for the Ninth Circuit.

Now comes the Northern Pacific Railway Company, by its counsel, and respectfully moves this honorable court that an order may be entered herein directing that the certified transcript in said cause, filed with the petition for the writ of certiorari, stand and be taken as the return to such writ of certiorari heretofore granted by the court, and in support of this motion submits the accompanying affidavit of Charles W. Bunn.

C. W. BUNN,
Attorney for Northern Pacific Railway Company, Petitioner.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

NORTHERN PACIFIC RAILWAY COMPANY,
Petitioner,
vs.
LOUISE H. ADAMS and FRANK H. ADAMS.

On Petition for Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR LOUISE H. ADAMS AND FRANK H. ADAMS IN OPPOSITION TO THE PETITION.

STATEMENT.

Jay H. Adams, the deceased, on the 13th day of November, 1898, went from Spokane, Washington, his home, to Hope, Idaho, and was returning therefrom in the afternoon of the same day, on a regular passenger train of the Northern Pacific Railway Company. The train left Hope at 4.15 p. m., being three hours and ten minutes behind time. (Train schedule marked Ex. A6, and Trans., p. 312.) The train consisted of a mail car, baggage car, express car, smoking car, first-class day coach, tourist sleeping car, dining car and Pullman

sleeper, placed in the train in the order named. The cars in the train occupied by passengers were vestibuled throughout with the exception of the tourist sleeping car, neither platform of which was vestibuled, nor were the sides of the platforms of the said tourist sleeping car enclosed by means of gates, rods, chains, or any other device, but were entirely open, permitting unobstructed ingress and egress to and from such platforms. (Trans., pp. 84, 85, 86.) A tourist sleeping car was customarily carried on the through passenger trains (Trans., p. 392) of which the train in question was one, and the platforms of all such tourist cars were open and unguarded, as were those of the car in this train, the company having no tourist sleeping cars with vestibuled platforms. (Trans., pp. 392, 649.) While customarily carrying a tourist sleeper in its trains, with such open and unguarded platforms, the company advertised to the public in three newspapers published in Spokane, all of which were taken and read by the deceased, including the advertisements, that its trains carried a dining car for the use of passengers, and a tourist sleeping car, and were entirely vestibuled throughout. These advertisements had appeared for months prior to the 13th day of November, 1898. (Trans., pp. 271, 272, 273, 280-283, 212, 213.)

The deceased boarded the train at Hope, at the front end, by getting upon either the rear end of the smoking car or the front platform of the adjoining first-class day coach, both of which cars were vestibuled, and proceeded immediately forward in the smoking car, and took

his seat in the front part of it, being accompanied by a friend with whom he was traveling. (Trans., p. 89.) And here it is proper to call attention to a misstatement of fact on the part of petitioner. On page 4 of its brief it is said:

"It is an established and uncontradicted fact that "they (referring to the deceased and a friend) got on to "the train by one of the unvestibuled platforms."

Mr. Gabbert, the friend of the deceased, swore positively that he and the deceased got on the train between the day coach and smoking car (Trans., pp. 89, 95), and he remembered that the day coach was vestibuled, and he did not remember as to the smoking car. (Trans., pp. 95, 98.) It is an admitted fact in the case that both smoking car and day coach were vestibuled. (Trans., p. 85.) It is apparent, therefore, that the deceased and Mr. Gabbert boarded the train by a vestibuled platform, that it was not admitted to the contrary, and that the above quoted statement is not correct.

Very shortly after the train started, and before any unusual speed had been attained, the deceased left the smoking car to go to the dining car to get some good cigars for himself and friend. (Trans. pp. 90, 91). The deceased did go to the dining car and did purchase cigars, and after doing so left the dining car, in the direction of the smoking car and the friend with whom he was traveling. (Trans. pp. 481, 484, 60, par. 7.) The dining car conductor saw him leave the dining car, and that was the last time he was seen alive by any person.

Very high speed was commenced about the west end of the Pack River trestle, reaching at the point where the body was found about sixty miles an hour. (Trans., pp. 104-106, 116-121, 126-134, 94, 95.)

The deceased could not be found when the train reached Spokane. Search being instituted, his body was found, on the next day, lying on the rocks opposite a six degree curve in the track about six miles and 2,100 feet west from Hope (Trans. pp. 190, 191), and one mile and 3,480 feet from the west end of the Pack River trestle. (Trans. pp. 191, 192, 142, 145, 149, 150, 187, 188, 175-180.) The plaintiffs are the widow and son of the deceased. (Trans. pp. 205, 209.)

BRIEF.

I.

The Questions raised by Petitioner and decided below are not Proper Questions to be brought to this Court by Certiorari.

We submit that this case is not one of those which, in the language of Mr. Justice BREWER, in Forsyth v. Hammond, 166 U. S., 512, "Involve questions of such "public and national importance as to require that a "consideration and determination thereof should be "made by the supreme tribunal of the nation." The questions raised by petitioner relate, (1) to the construction of local statutory law—that is to say, of two state statutes; (2) to the interpretation of the meaning of a written contract between two parties; (3) to

the sufficiency of the pleading, or complaint; (4) to whether certain acts alleged as negligence under the circumstances of this particular case, should have gone to the jury, or have been decided by the court as a question of law; (5) to whether there was sufficient evidence to go to the jury on the question of fact as to what caused the death of the deceased; (6) to the court's refusal to admit certain evidence which it was contended would show that petitioner was not guilty of negligence.

It seems clear to us that these questions have the very character of the questions which the act of March 3, 1891, was passed to relieve this court of, and which that act, as interpreted by this court, contemplated the lower courts might safely be permitted to decide.

Ex Parte Woods, 143 U. S., 202.

It is suggested by the petitioner that in eight states, besides Idaho and Washington, there are statutes providing for actions for death by wrongful act, from which legislatures have seen fit to omit certain language omitted from the statutes relating to this subject of Idaho and Washington. What other resemblances there are between the local statutes of these several states besides the omission of the specified language, petitioner does not point out, if there are any, nor indicates whether the resemblances between these various state statutes are so marked that the interpretation of one would be a rule competently interpreting all. But if the far presumption might be indulged that each state's statute would not have to be interpreted by a close scru-

tiny of the exact phraseology of each, yet it is submitted that the interpretation of each state's statute is a local matter and not one for which this court is called upon to establish a general rule of decision. It is not urged in this connection, by petitioner, that these statutes are in conflict with constitutional provisions, nor is any other reason asserted making the interpretation of these state statutes peculiarly within federal jurisdiction. It is the duty and right of each state to interpret, by its own highest tribunal, its own statutes. It is not even asserted by the petitioner that in these many states such interpretation has not been had and a satisfactory rule established. The rule seems well settled that the federal courts within such states would be governed by the interpretation of their statutory law by the state supreme courts. If such interpretation has not been had by each state, a general rule laid down by this court, we submit, would not preclude the supreme tribunal of each state from establishing its own interpretation of the state's statute irrespective of the conclusion reached in that regard by this court. It is not asserted, nor is it the fact, that the state of Washington, or the state of Idaho, has given an interpretation to these statutes in conflict with that in which the two courts below have concurred. We submit, therefore, that though many states have such statutes, the question of their interpretation is not of "such public and national importance" as to put in operation the extraordinary jurisdiction of this court that is now invoked.

The other important question in the case which is raised by petitioner, though not important in connection with the exercise of the jurisdiction of this court, is the interpretation of the written contract between deceased and petitioner. The intent and meaning of the parties to the written contract is to be sought for and found in the language of the instrument and the surrounding circumstances, that is, by the ordinary and time worn rules, the same in all courts, for the interpretation of contracts. We submit that the application of these fixed rules to this written instrument is properly with the courts below, and that the correct application of the rules of law involved and the meaning of this particular written instrument are not of such general importance as to make the question an appropriate one to be brought to this court on certiorari. The question here is simply one of interpretation—what did the parties to the contract intend as shown by the writing?

The actual thing which this court is asked to do, and which it is asked to exercise this unusual jurisdiction to enable it to do, is to write into the laws of the two states a term not put there by the legislatures which made them, and into the written contract a term not put there by the parties which made *it*, and this extraordinary jurisdiction is invoked and these extraordinary things are requested all to the end that this common carrier may kill a citizen with impunity under circumstances which, measured by the ordinary standards of

human conduct and the ordinary rules governing in all courts, will constitute negligence.

The effort to force an additional term into these statutes is made also in the face of the ruling of this court in Louisville, E. & St. L. R. Co. v. Clark, 152 U. S., 240, where, construing a statute giving a right of action for death by wrongful act, this court, by Mr. Justice HARLAN, said:

"The statute imposes no other condition upon the "right to sue. The court has no authority to impose "an additional or different one."

The effort to instil doubt into this court's mind as to the correctness of the judgments in this cause in the courts below, by pointing to a supposed defect in the pleadings, namely, to the failure to plead in the complaint the statute of Idaho, and to the failure to introduce the same in evidence, hardly merits special reference. We do not think that a defect in the pleading, or even an insufficiency in the proof, will be deemed of such great and general importance as to be a proper basis for an application to this court for its writ of certiorari. This thought is accentuated by the fact that the omission of the statute from the pleading was not complained of in the trial court by demurrer or otherwise. It is further emphasized by the fact that such a defect in the pleading would not be noticed by this tribunal even in the exercise of its ordinary jurisdiction on appeal or writ of error.

Railroad Company v. Lindsay, 4 Wallace, 650.
Van Ness v. The Bank, 13 Pet., 17.
Ewing v. Howard, 7 Wallace, 499.
Allend v. Spokane Falls etc. Co., 21 Wash., 324.

The whole criticism in this regard is rendered idle by the fact that the federal courts will take judicial notice of the laws of the several states and administer them without their being pleaded or offered in evidence.

Owings v. Hull, 9 Pet., 607.
Covington Drawbridge Co. v. Shepherd, 20 How., 227.
Lamar v. Michou, 114 U. S., 218.

It is intimated by the petitioner that the Circuit Court of Appeals, in its ruling that the contract made by the deceased does not bind the plaintiffs, is in conflict with the ruling of the Supreme Court of the state of Washington in the case of Muldoon v. Seattle City Railway, 7 Wash., 528; 10 Wash., 311. A glance at that case, however, immediately discloses the entire absence of any possible conflict between it and the ruling of the Circuit Court of Appeals in the case at bar. In that case the party who had made the contract with the carrier was not killed, but himself brought the action against the company for the personal injuries inflicted. The question, therefore, of the effect of such an agreement where death had been caused and suit instituted by the heirs for their own loss, could not have been, and was not touched upon in that case. Furthermore, in-

asmuch as the party injured brought the suit himself, the question whether such an agreement *also* exempted the carrier from liability for *death* could not have been, and was not raised or decided. Hence, that case has no bearing whatever on the questions presented by the petitioner.

It is further urged by the petitioner that the writ must issue in the interest of uniformity of federal decision, it being alleged that the ruling of the Circuit Court of Appeals of the Sixth Circuit, in the case of Sansom v. Southern Ry. Company, 111 Fed., Rep., 887, is in conflict with the ruling of the court below, which latter permitted the presence of a car in the train unvestibuled *and* unguarded at the sides of the platforms so as to prevent passengers falling therefrom, to be considered by the jury in determining whether, under all the circumstances of this particular case, the petitioner was guilty of negligence. (Trans., pp. 807, 808, par's 20, 22.) There is no conflict whatever between the Sansom case and the case at bar. In the Sansom case there was no dining car carried in the train, constituting a standing inducement and incentive to all the passengers to go from one car to another. There was no standing invitation to all the passengers to use at all times another car than that they rode in, and there was an entire absence of the obligation on the carrier (present in the case at bar) to arrange the diner and the train so that the diner might be *safely* used in the manner directed by the carrier and for the purposes for which the carrier invited the

passengers to use it. There was no element of negligence whatever shown in the Sansom case, except the absence of the vestibule; while in the case at bar it was alleged and shown by the proofs that while carrying a diner, with a standing invitation to the passengers to use it and to pass to and from it at all times, a car was sandwiched in the *middle* of the train, which might have been carried at either extreme end (Trans. pp. 531, 532, 554, 249), being unvestibuled *and* with the sides of its platforms entirely unguarded so as to prevent passengers falling therefrom as they passed over the platforms to and from the diner (Trans., pp. 84, 86), and that, charged with the knowledge that passengers would be acting on the invitation and passing to and from the diner over these unguarded platforms, the petitioner ran its train at an excessive rate of speed around an exceedingly sharp curve. (Trans., pp. 104-106, 116-121, 128-134, 94, 95, 189-192, 142, 145, 149, 150, 187, 188, 175-180, 303.) It was further proved in the case at bar that the higher the speed the greater the jolt at the sharp curves (Trans., pp. 660-663), and that, charged with the knowledge that at any sharp curve its invitation was being acted upon by its passengers and that they were passing to and from the diner over the unprotected platforms, while running the train at about sixty miles an hour the air brake was not applied at the particular sharp curve where the deceased was thrown from the train. (Trans., pp. 351, 354.) It was further proved that it was customary and proper at sharp curves, when the train was running at high

speed, to apply the air brake, to the end that the jolt or jar at such curves would be moderated, and that such was the effect of the air brake when applied under such circumstances. (Trans., pp. 351-354.)

These facts show the sharp distinction between the Sansom case and the case at bar. They further show the assertion by petitioner, that the only negligence alleged in the case at bar was high speed and absence of the vestibule, is markedly incorrect. The absence of the vestibule could not be considered as the negligence in the case, standing separate and alone as an isolated fact, nor was it so presented to the jury. It was presented by the court's charge to the jury in connection with the carrying of the diner, in connection with the position of the unvestibuled car in the train, in connection with the absence of "railings, rods, chains or gates to enclose the platforms," and "under the circumstances." The quoted matter is from the court's instructions Nos. 22 and 20. (Trans., pp. 808, 807.)

Furthermore, the absence of the vestibule and other guards at the sides of the platforms was pleaded as an element of negligence (Trans., pp. 16, 17), and the evidence of it was introduced in support of the pleading with the consent of petitioner and without any objection made to its introduction. (Trans., pp. 84-87.) In the stipulation putting this matter in evidence, petitioner reserved the right to object if it wished to, but never did so. It would seem entirely too late for petitioner to complain of the court's telling the jury that they might consider the

evidence which the petitioner itself had thus consented might be given to them for their consideration.

1 Thompson on Trials, § 700.

On page 16 of its brief, the petitioner asserts that "This case is like the Voigt case" (176 U. S., 498), and further asserts, *without showing or suggesting that any relation of master and servant, or of fellow servants, exists in the case at bar*, and notwithstanding that there is no such relation in the case (the deceased not being employed by petitioner directly, indirectly or by possible inference), that the law of fellow servants should govern here. This latter assertion is not much more extravagant than the many propositions urged, but we believe this statement will dispose of it.

In regard to the Voigt case the distinction is immediately obvious. The plaintiff in that case was an express messenger, carried by the railroad to care for express matter, under a contract between the railroad and the express company. The court held that, in effect, Voigt was a co-employe of the other employes of the railroad, he holding, in his work and duties and place on the train, substantially that relation to them. The near analogy between his position and that of a servant injured by the negligence of his fellow servants is forcibly depicted, and, upon the theory of the freedom of the master from liability for the injury to one servant by the negligence of co-servants, the railroad was held to have competently made its contract exempting itself from liability for negligence of its servants. The

court's language is very explicit in pointing this analogy, and it lays great stress on language equally clear, of a similar tenor, used in other cases and particularly in Bates v. Old Colony R. Co., 147 Mass., 255. The court further intimated that Voigt was a part of the express company, which was in effect being carried, and that the express company was a common carrier, and that it was not the duty and function of a common carrier to carry common carriers, and hence, in carrying the express company or its representative on the train, acting as the express company, the railroad was not a common carrier. The court further carefully differentiates Voigt from a passenger by showing that he was carried, not among the passengers, though on a passenger train, but on a car specially constructed for express matter, to handle and care for matter transported during the period of transportation, doing work similar to that done by employes, and was not carried for the purpose of transporting him from one point to another; in all these particulars bearing a close resemblance to an employe and that thus he was not within the definition of a passenger. These conditions, *all absent from the case at bar*, most radically distinguish the two. In the Voigt case the party who made the contract was not killed, but himself brought the suit for the personal injuries, while in the case at bar the party who made the contract *was* killed, and the suit was brought by his heirs, under a local statute, for his *death* and the consequent injury to themselves. Even the element of free carriage did not enter into the Voigt

case, inasmuch as, as explained in the Lockwood case (17 Wall., 357), Voigt's "passage was one of the mutual terms of the arrangement for carrying" the express matter, and, therefore, Voigt was carried for hire.

As a ground for the issuance of the writ by this court, the charge made by petitioner of error by the trial court in ruling out the pass and contract when offered in evidence, the materiality of the evidence, as *now* explained, being to show that the petitioner owed the deceased a less degree of care than that owing a passenger, and so tending to prove that the petitioner was not guilty of negligence, is of but slight importance we think and wholly inadequate. Even though the question were of sufficient importance, the evidence was clearly not competent. But were it otherwise, there is a factor in the case in connection with the offer of this evidence which, we submit, should cause reluctance on the part of this court to exercise its extraordinary jurisdiction to aid the petitioner in this behalf. When the counsel for petitioner, having in mind the subtle and refined use and object for which it was intended, as *now* explained, offered this pass and contract in evidence, the court had theretofore, in that trial and the prior one, shown that he knew of no ground for its introduction (Trans., pp. 40-44), and counsel for plaintiffs knew of none. Under these circumstances counsel for plaintiffs asked the counsel for the petitioner what the object of the offer was, and counsel for petitioner preferred to keep the very ingenious theory of its alleged effect, *now* presented, to himself, and refused to state

the object, evidently to get error in the record for appellate purposes purely. (Trans., pp. 784-786.) We can conceive of no other object for this secrecy. Thus the court below, by petitioner's affirmative effort to that end, was deprived of the opportunity to keep the record straight in that regard, if the evidence *was* competent. From the nature of the transaction it would appear, if the ruling *was* wrong, that petitioner *intended* that the court should rule wrong and that plaintiffs should not have the information which might enable them to correct it.

We submit that, in this particular, the petitioner is so far the author of any injury that may have resulted to him in connection with the ruling out of this evidence that this court will not put in force its extraordinary machinery and assume the burdens of reviewing this case for petitioner's relief. (For discussion of contract and pass as evidence see pp. *41-48 infra.*)

In keeping with the general unsoundness of petitioner in this application is his reasoning relative to the alleged inconsistency of the trial court in instructing the jury that contributory negligence by deceased would bar the action. There was no inconsistency whatever between the position of the courts below that the plaintiffs were not affected by the contract of the deceased and that, in respect of the plaintiffs' rights, the jury should consider the duty owed the public generally, on the one hand, and the instruction that contributory negligence on the part of the deceased would bar the action. The state statutes only authorize suit for the wrongful act of the de-

fendant company. If the negligence of deceased *had* contributed and it was held no bar, the defendant company would be made liable for its own negligence *and that of another person also.* It would seem clear that the inability to determine how much of the damage would be attributable to the defendant company, if the deceased had contributed by negligence, would make the principle of contributory negligence as applicable here as elsewhere.

We further submit that, to put in operation this extraordinary jurisdiction, the obligation rests upon the petitioner to show affirmatively, even though the questions are of sufficient general importance to engage this court's attention by means of the writ, that the courts below are *probably* wrong. We submit that there should be raised a strong probability of error in order to overcome the presumption of competent decision by a court of high rank and dignity, which presumption is greatly enhanced by the extraordinary care of the trial court to insure a fair trial of the cause, shown by the thoughtful, painstaking and elaborate character of the instructions. (Trans., pp. 800-825.) We think this is in accord with the views of this court as expressed by Mr. Chief Justice FULLER, in Ex Parte Lau Ow Bew, 141 U. S., 583, as follows: "This branch of our jurisdiction should be exercised sparingly and with great caution," and "The inquiry upon this application, therefore, is "whether the matter is of sufficient importance in itself "*and sufficiently open to controversy* to make it the "duty of this court to issue the writ applied for." The

probability of error, we submit, has not been shown by the somewhat disconnected suggestions of the petitioner.

Since, however, the questions have been raised, and it being possible that this court may view them as of that great and national importance demanding their decision by the supreme national tribunal, we feel it necessary to remove the possibility of doubts which might arise in the court's mind, and to show to the court that the questions presented by the petitioner are not "suffi-"ciently open to controversy to make it the duty of this "court to issue the writ applied for." We are specially impelled to this full presentation because of several inaccuracies which have crept into the petitioner's showing, which make a close scrutiny of the record necessary, and because of the fact that the widowed plaintiff has borne the burden of three trials of this cause—two in the trial court—and we do not feel justified in permitting the risk of the burdens of a fourth trial and the consequent delay to fall upon her through want of light on the real merits of these questions at this time.

II.

The Relation of the Statutes of Idaho and Washington and the Contract between Deceased and Petitioner to the Rights of the Plaintiffs.

The contract on the back of the transportation alleged to have been used by the deceased at the time of his death (Trans., p. 784), which contract purports to release the petitioner from all liability for injury to the person

of the deceased, caused by the negligence of the petitioner, is void as against the plaintiffs.

(1) Because plaintiffs were not parties to such contract, and over *their* right of action for loss to *them*, deceased could exercise no control.

(2) Because the contract does not exempt the carrier from liability for death.

(1) THE STATE STATUTES.

The plaintiffs have an independent, separate and distinct right of action for the losses to them occasioned by petitioner's negligence, which right of action the deceased could neither enjoy nor in any wise control.

The negligence of the petitioner, and the death of the deceased therefrom, both occurred in the state of Idaho. The statute of Idaho authorizing this action to be brought is as follows:

"When the death of a person, not being a minor, is "caused by the wrongful act or neglect of another, his "heirs or personal representatives may maintain an ac- "tion for damages against the person causing the "death; or, if such person be employed by another per- "son who is responsible for his conduct, then, also, "against such other person. In every action under this "and the preceding section, such damages may be given "as, under all the circumstances of the case, may be "just." (Revised Statutes of Idaho, § 4100.)

The statute of Washington, in which state the action was brought, is as follows:

"The widow, or widow and her children, or child or "children, if no widow, of a man killed in a duel shall "have a right of action against the person killing him, "and against the seconds and all aiders and abettors. "When the death of a person is caused by the wrong- "ful act or neglect of another, his heirs or personal "representatives may maintain an action for damages "against the person causing the death, or when the "death of a person is caused by an injury received in "falling through any opening or defective place in any "sidewalk, street, alley, square or wharf, his heirs or "personal representatives may maintain an action for "damages against the person whose duty it was, at the "time of the injury, to have kept in repair such side- "walk or other place. In every such action the jury "may give such damages, pecuniary or exemplary, as, "under all the circumstances of the case, may to them "seem just." (2 Ballingers's Annotated Codes and Statutes of Washington, § 4828.)

These two statutes are for the exclusive benefit of the heirs, and are not for the benefit of the estate of the deceased. This answers petitioner's reasoning on page 12 of its brief, the statutes of California and Idaho being identical.

Munroe v. Dredging etc. Co., 84 Cal., 515.
Noble v. Seattle, 19 Wash., 133.

It will be noted that, with the exception of four words in the Idaho statute, to-wit: "not being a minor," the

language of the two statutes of Idaho and Washington is identical where authorizing an action for death caused by wrongful act or neglect.

There is one proposition in the interpretation of this character of legislation in support of which there is a vast weight of concurrent authority, and that proposition is that Lord Campbell's act, and the many acts inspired by it in the various states of this country, including the two states of Idaho and Washington, create and grant to other persons than the deceased or his estate, an independent right to recover for the losses sustained by such other persons through the negligence of a party causing death, such right of action being separate and distinct from any right of action which the deceased had, or could have enjoyed had he survived.

The English interpretation of Lord Campbell's act is unmistakably to this effect. In Blake v. Midland Ry. Co., 18 Q. B., 93; 10 Eng. L. & Eq., 443, Mr. Justice COLERIDGE says:

"The title of this act may be some guide to its mean-
"ing, and it is an act for compensating the families of
"persons killed, not for solacing their wounded feelings.
"Reliance was placed upon the first section which states
"in what cases the newly given action may be main-
"tained although death has ensued, the argument be-
"ing, that the party injured, if he had recovered, would
"have been entitled to a solatium and, therefore, so shall
"his representatives, on his death. But it will be evi-
"dent that this act does not transfer this right of action

"to his representative, but gives to the representative a "totally new right of action on different principles. "Section 2 enacts that 'In every such action the jury "'may give such damages as they may think propor- "'tionate to the injury resulting from such death, to the "'parties, respectively, for whom, and for whose benefit "'such action shall be brought. The measure of "'damage is not the loss or suffering of the deceased but "'the injury resulting from his death to his family.'"

In Reed v. Great Northern R. Co., L. R., 3 Q. B., 555, there seems to have been some language used, which has been pointed to by various courts since as showing a reversal of the interpretation in Blake v. Midland R. C., *supra*, but the same proposition was squarely held subsequently in Leggott v. Great Northern R. Co., L. R. 1 Q. B. Div., 599; and the same ruling occurs again in Robinson v. Canadian P. R. Co., decided by the house of Lords in 1892. An analysis of the English cases is found in Brown v. Chicago & Northwestern R. Co. (Wis.), 44 L. R. A., 579.

In our own country the construction put upon Lord Campbell's act in Blake v. Midland R. Co., *supra*, has been widely followed. In the case of Chesapeake & Ohio R. Co. v. Dixon, 179 U. S., 131, this court construed one of these acts, as follows:

"Section 6 of the Kentucky statutes provides: 'when "'the death of a person shall result from an injury in- "'flicted by negligence or wrongful act, then and in "'every such case, damages may be recovered for such

"'death from the person or persons, company or com-
"'panies, corporation or corporations, their agents or
"'servants, causing the same; and when the act is wilful
"'or the negligence is gross, punitive damages may
"'be recovered and the action to recover such damages
"'shall be prosecuted by the personal representative of
"'the deceased.'

"The cause of action thus created is independent of "any right of action deceased may have had, or would "have had if he had survived the injury."

In Gerling (Martin) v. Baltimore & O. R. Co., 151 U. S., 696, the court, considering the act of West Virginia, says:

"The right of action thus given although for the "same act or neglect for which the person injured "would have had a right of action in his lifetime, differs "from an action brought by him, both in the ground on "which it proceeds and in the award of damages. It is "not a common law action to recover damages for the "injuries suffered by him while he lived, but it is an "action given by statute for causing his death."

In Hulbert v. City of Topeka, 34 Fed. Rep., 510, Mr. Justice BREWER, then on the bench of the federal circuit court, discussing the statute of Kansas, in substance similar to Lord Campbell's act, says:

"Section 422 gives a new right of action, one not "existing before; an action which is not founded on "survivorship; an action which takes no account of the

"wrong done to the decedent, but one which gives to the "widow or next of kin damages which have been sus- "tained by reason of the wrongful taking away of the "life of the decedent. It makes no difference whether "the injured party was killed instantly or lived months; "whether he suffered lingering pain or not; whether "or not he was put to any expense for medical attend- "ance and nursing. None of these matters are to be "considered in an action under 422; and the single "question is, how much has the wrongful taking away "of his life injured his widow or next of kin? It is an "action to recover damages for the death, and in no "sense a survival of an action which accrued to the de- "cedent before his death; whereas, on the other hand, "section 420 provides for the survival of an action which "the decedent himself had in his lifetime."

In the Oregon, 73 Fed., 846, construing the Oregon statute, the court adopted this rule and says:

"It is substantially like Lord Campbell's act; and in "the case of Seward v. Vera Cruz, *supra*, the view held "was (Lord Blackburn concurring) not that the cause "of action survived, but that 'a totally new action is "'given against the person who would have been re- "'sponsible to the deceased if the deceased had lived; "'an action which, as is pointed out in Pym. v. Rd. Co., "'4 Best. & S., 396, is new in its species, new in its "'quality, new in its principle, in every way new, and "' which can only be brought if there is any person an- "'swering the description of the widow, parent or child,

"'who under such circumstances suffer pecuniary loss "'by the death.'"

In Munro v. Dredging etc. Co. 84 Cal., 515, the supreme court of that state, in discussing the statute of that state, which is written verbatim as the statute of Idaho, says, after quoting from Blake v. Midland R. Co., *supra*:

"We agree with what is said in the opinion above "quoted that the action given by the statute is a new "action, and not the transfer to the representative of "the right of action which the deceased person would "have had if he had survived the injury."

In Brown v. Chicago & Northwestern R. Co. (Wis.), 44 L. R. A., 579, in construing the statute of Wisconsin, similar in substance to Lord Campbell's act, and also the statute of that state of survival of the right of action had by the deceased, the supreme court of that state says:

"The death loss act of the English statute (9 and 10 "Vic. C., 93) commonly called 'Lord Campbell's act,' "and the various laws of a similar kind that have "been modeled after it, give a new cause of action, un- "known to the common law, for the benefit of certain "designated classes of surviving relatives. Such rela- "tives do not take the cause of action for damages to "the deceased by transfer to them by operation of law "or otherwise, but are enabled by statute to recover the "pecuniary loss to themselves caused by the wrongful

"taking off of the decedent, the continuation of whose "life would have been beneficial to them. * * * But, "independent of that circumstance, as before observed, "the language of the two provisions is plain; they re- "fer to entirely distinct losses, recoverable in different "rights; the one in th right of the deceased for the "loss occasioned to him; the other in the right of the "surviving relatives for the loss to them. * * * * * "The liability of the wrongdoer * * * is * * * on "a new right created by the statute—the right of sur- "viving relatives to compensation for the loss which "falls upon them."

As will be observed from the opinion of Mr. Justice BREWER in Hulbert v. City of Topeka, 34 Fed., 510, his views of the scope and effect of the statute of Kansas compensating loss by death, differed from the opinion of the supreme court of that state, expressed while Mr. Justice BREWER was a member of it, but the latest decision of the judiciary of that state, rendered by its court of appeals, refused to follow the supreme court, and is in accord with the views of Mr. Justice BREWER.

Mo. Pac. Ry. Co. v. Bennett's Estate., 47 Pac., 183.

In Perkins v. New York Central Rd. Co., 24 N. Y., 200, the court, in construing the New York statute based on Lord Campbell's act, says:

"This is a new and original cause of action given by "and dependent wholly upon the statute. The dam- "ages recoverable in such case depend upon entirely

"different principles from those recoverable by the per-
"son injured in case death had not ensued from the in-
"jury. In such case the person injured would only
"recover compensatory damages personal to himself,
"including expenses incurred and losses sustained in
"consequence of the injury. (Lincoln v. S. & S. Rd.
"Co., 23 Wend., 425.) But in a case where death re-
"sults from the injury the pecuniary value of the life
"of the person killed to the next of kin is the measure
"of damages, to the extent of five thousand dollars.
"(Whitford v. P. M. R. Co., 23 N. Y., 467; Blake v.
"Midland Ry. Co., 10 Eng. L. & Eq., 443.)"

To the same effect as the foregoing cases, are:

Adams v. N. P. Ry. Co., 95 Fed., 938.

Davis v. St. Louis I. M. & S. Ry. Co. (Ark.), 7 L. R. A., 283.

Jeffersonville R. Co. v. Swain, 26 Ind., 484-486.

Littlewood v. Mayor etc., 89 N. Y., 27.

Western & A. R. Co. v. Bass, 104 Ga., 392; 30 S. E., 874.

Vicksburg & M. R. Co. v. Phillips, 64 Miss., 693; 2 So. R., 537.

Hurst v. Detroit City R. Co., 84 Mich., 539; 48 N. W., 44.

Needham v. Grand Trunk Ry. Co., 38 Vt., 294.

Bowes v. Boston, 155 Mass., 344; 15 L. R. A., 365.

Commonwealth v. Met. Rd. Co., 107 Mass., 236.

Donahue v. Drexler, 82 Ky., 157; 56 Am. Rep., 886.

Fink v. Garman, 40 Pa. St., 95.
The Onoko (C. C. A.), 107 Fed., 984.
Roche v. Imperial Mining Co., 7 Fed., 703.
Re Mayo (S. C.), 54 L. R. A., 665.

It is manifest from the foregoing that the deceased during his life had no interest or right in the right of action granted exclusively to his heirs, which enabled him to release the petitioner from its liability for the loss to the plaintiffs, caused by petitioner's negligence.

There are many cases, however, both English and American, which hold that, unless the deceased had in him unimpaired a right of action for *his* injuries, at the time of his death, his heirs could not enforce *their* right of action under Lord Campbell's act, and the acts of various states in this country having certain peculiarities in them found in Lord Campbell's act. In some of these cases it has been held that a release by the deceased during life of *his* right of action barred the heirs of *their* right of action.

It is patent that, having an independent right of action for their loss under the statutes of Idaho and Washington, there must be found within the statutes creating such independent right of action an affirmative, positive, restriction upon, or qualification of, its full enjoyment by the plaintiffs in order to bar them from its prosecution. In Louisville etc. R. Co. v. Clarke, 152 U. S., 240, this court, construing a statute giving right of action for death, said:

"The statute imposes no other condition upon the

"right to sue. The court has no authority to impose "an additional or different one."

Herein lies the difference between the statutes of Idaho and Washington on the one hand, and Lord Campbell's act and most of the statutes of the states of the Union relative to death by wrongful act, on the other. In the two former there is no language out of which any condition to or qualification of the right of action in the heirs or widow and children can be construed. In nearly all the latter, and in those under which the courts have held the heirs barred of their right of action because of a release given or judgment gotten by the party injured during his life, is found the same peculiar language found in Lord Campbell's act, which is held to make the prosecution of the independent right of action given the heirs, conditional upon the existence in the deceased of his right of action unimpaired at the time of his death. This peculiar language is entirely absent from the statutes of Idaho and Washington. It is as follows:

"The act, neglect or default is such as would, if death "had not ensued, have entitled the party injured to "maintain an action and recover damages in respect "thereof, then and in every such case, the person who "would have been liable, if death had not ensued, shall "be liable to an action for damages, notwithstanding "the death of the person injured."

Out of this language, or similar language, the courts have held that the act or acts being construed contained

a *condition* to the prosecution by the heirs of the independent and distinct right of action for their loss, and that only when the condition existed could they prosecute their right of action. Thus in Brown v. Chicago & Northwestern R. Co. (Wis.), 44 L. R. A., 589, the court quotes the last expression of the English courts upon the construction of Lord Campbell's act, and adopts the view expressed as its own, as follows:

"As I have before said, I am of opinion that the "action being of the same nature, and indeed the same "action in all respects, as that conferred by Lord Camp- "bell's act it must, as an action on that statute is con- "sidered in England, be deemed to be a new action, but "still a new action dependent on the condition that the "action of the deceased had not, at the time of his "death, been barred or extinguished."

Again, in Littlewood v. Mayor etc. of New York, 89 N. Y., 24, which is a leading case in support of the proposition that the party injured may, by releasing the wrongdoer from liability for injury to his person bar his heirs of *their* right of action for the injury to them by his death, the court admits that the heirs have an independent and separate right of action for the losses occasioned to them by the death, and an entirely different right of action from any had by the deceased in his life time, and not a survival of any right had by him. But, while admitting this, the court holds, *because of the peculiarity of the language* heretofore quoted from Lord Campbell's act and found in the New York act, that it

is clear that the legislature intended that only in the event that the party injured had his right of action intact at the time of his death, could his heirs prosecute their right of action.

In another leading case, Hecht v. O. & M. Ry. Co. (Ind.), 32 N. E., 302, barring the right to recover for the death, by reason of recovery on his right of action during life by the deceased, the court, construing an act containing substantially the language above quoted from Lord Campbell's act, says:

"For *the act*, as we construe it, *clearly declares* that "the personal representatives of the injured party, "when death ensues, may maintain the action only in "case the injured party might, at the instant of his "death have maintained the action if he had lived. In "this case the injured party at the time of his death "could not have maintained an action for the same act "or omission had he lived; hence there is no right of "action given to his personal representatives by the "statute."

And in Sherlock v. Alling, 44 Ind., 197, the court says:

"The right of action, which the deceased had at his "death, is not by the law transferred to his representa- "tives, but it gives to them a totally new one on different "principles * * yet *by the terms of the act*, no action "can be maintained under it, unless the act or omission "causing the death was such that the deceased might,

"if alive, maintain an action for an injury caused by "the same act or omission."

The statute of South Carolina is verbatim Lord Campbell's act (Tiffany, Death by Wrongful Act, p. 329), and Price v. Richmond & D. R. Co., 33 S. C., 556, 12 S. E., 413, is one of the leading cases holding that a release of the railroad from liability for his injuries by the deceased during life bars the widow and children of *their* right of action for the death. The court says:

"But the construction which we have adopted seems "to us to be the only legitimate one which can be de- "duced from the *terms of the statute*, and it has the sup- "port of high authority."

Re Mayo (S. C.), 54 L. R. A., 665.

In the case of Hill v. Pennsylvania R. Co., 178 Pa., 223, 35 L. R. A., 196, a release given the railroad company by the deceased during life, was held to bar suit by the widow for his death. Here again we find potent language in the statute, on which the decision rests, and which is entirely wanting in the Idaho and Washington statutes, and there are other pronounced differences. An action after death is permitted "Whenever death "shall be occasioned by unlawful violence or negligence, "*and no suit for damages be brought by the party in-* "*jured during his or her life*" etc. From this language and other features of the statute peculiar to it, the court construes it to merely keep alive to certain specified persons the very right had during life by the deceased

to recover for *his* injuries; that the widow could not recover under it in her own right for her own injuries; and that the deceased, having full power in life to prosecute this *his* own right of action, had also as "a neces- "sary incident to the right of ownership of the right of "action," the right to settle it by release. None of the peculiarities of this statute on which the decision rests are to be found in those of Idaho and Washington.

In the case of Lubrano v. Atlantic Mills, 19 R. I. ....., 34 L. R. A., 797, the court seems to hold that, under the act of Rhode Island containing language similar to that of Lord Campbell's act, where there is also an act surviving the right of action for the injuries suffered by the deceased, there is not given a separate and independent right of action to the widow and children of the deceased for the losses suffered by *them*, but that there is only a sort of a continuance or survival of the right of action which the deceased had, and that after his death, notwithstanding the distinct survival statute, an action would not lie on behalf of the estate of the deceased and also on behalf of the widow and children.

This is in conflict with the great weight of authority heretofore cited, but if it were not, the reasoning pursued by the court does not invite reliance upon its conclusion. It says:

"Upon this principle the new remedy must be ex- "clusive *since otherwise there would be two recoveries for* "*the same cause of action* namely, the negligence of the "defendant, which is the cause of action on which the

"deceased would have sued at common law, if he had "survived."

In this case the court seems to esteem it a hardship on the wrongdoer, from which the legislature *must* have sought to save him, that the wrongdoer should have to pay damages twice for the same wrongful act, once to the party injured by being hurt physically, and again to another party injured by being deprived of support, maintenance, etc. This reasoning appears in several cases where the scope of the statute is restricted. In this view the damages are treated as a penalty or punishment and it is regarded in these cases as a harsh and unjust measure to punish twice for the same offense. If the sympathetic eye in these cases were not focused exclusively on the corporation, but were permitted to view the person injured and the widow and children, it would be readily seen that the damages recovered are not, except incidentally, in the way of punishment of the corporation, but in the way of compensation for their losses.

We are not able to perceive why the corporation should not be liable to two parties, each injured by a single act of negligence, in these case, with as much propriety as when, by a collision from negligence, thirty, forty or one hundred different people are injured by the same negligent act. In the latter case a court would hardly suggest that only one of these many injured persons could recover on account of the negligent act which had injured the many, or that a release by such one

would preclude the other injured individuals from recovering for their loss through such negligent act. In the case at bar the widow and child are separate and distinct individuals, having separate and distinct capacities from that of the deceased to suffer loss, and through the act of negligence which also injured the deceased, these plaintiffs have been made to suffer pecuniary loss. There is certainly nothing harsh or inequitable in the statute giving to people, wrongfully deprived of support, education, etc., their own right to recover for themselves the peculiarly personal loss thus sustained exclusively by them. Certainly the proposition is not so inequitable as to induce the court to impose an arbitrary condition to the enjoyment of this right, to support which condition there is no word in the statute.

Hedrick v. Ilwaco R. & N. Co., 4 Wash., 400.
Brown v. Chi. & Northwestern R. Co. (Wis.), 44 L. R. A., 579, 585.
Louisville etc. R. Co. v. Clarke, 152 U. S., 240.

The court in Lubrano v. Atlantic Mills, *supra*, says as a further reason for its conclusion:

"A further consideration in favor of a single action "is the confusion of damages which would result from "the maintenance of two actions. Although they might "be theoretically separate, a practical separation would "be quite impossible. The measure of pain and suffering, or estimated damage to one's estate cannot be so "definitely marked as to limit liberality of a sympathetic jury."

It does not seem to us that because a jury may be sympathetic, such fact should weigh in the legislative mind against giving a party injured by the wrongful act of another the right of action for such injury, nor should the sympathy of a jury for one man's pain and suffering preclude the legislature from giving the right of action to a woman and her children for actual financial losses sustained by them from the same wrongful act that caused such pain and suffering to another. We cannot agree with the learned court that it is impossible to prove separately and distinctly the damages sustained by the deceased from injuries to him, and the damages sustained by the widow and child from the distinct losses occasioned to them by the same negligent act, and the New York supreme court agrees with us.

Littlewood v. The Mayor etc. of New York, 89 N. Y., 28.

Finally, in this analysis of authorities, we call attention to the case of Donahue v. Drexler, 82 Ky., 157; 56 Am. Reps., 886, in which the effect of a release by the deceased during life, under a statute, for the purposes of the question now discussed, identical with those of Idaho and Washington, has been considered.

One Kentucky statute is as follows:

"Section 1. If the life of any person not in the em-
"ployment of a railroad company shall be lost in this
"commonwealth by reason of the negligence or careless-
"ness of the proprietor or proprietors of any railroad,

"or by the unfitness, or negligence or carelessness of "their servants or agents, the personal representatives "of the person whose life is so lost can institute suit "and recover damages in the same manner that the "person himself might have done for any injury where "death did not ensue." (Tiffany, Death by Wrongful Act, p. 300.)

From its latter part this section has been construed, in Louisville & N. R. Co. v. McElwain, 98 Ky., 700, 34 L. R. A., 788, as a survival statute, keeping alive a right of action within the control of the person injured during life. Kentucky has a further statute, as follows:

"Section 6. The widow and minor child or children, "or either or any of them, of a person killed by care- "less, wanton or malicious use of firearms or by any "weapon popularly known as colts, brass knucks or "slung shots, or other deadly weapons, not in self- "defense, may have an action against the person or per- "sons who committed the killing, and all others aiding "or promoting the killing, or any one or more of them, "for reparation of the injury, and in such action the "jury may give vindictive damages." (Tiffany, Death by Wrongful Act, p. 300.)

It will be noted that in the section of the Kentucky statute last quoted no condition is imposed upon the right of the widow or children to bring their action; the right is given absolutely, without restriction directly or by implication, and irrespective of any rights whatever,

or the exercise of them, which the person assaulted may have had in the premises. It is identical in these respects with the statutes of Washington and Idaho giving the right to recover for death.

In Donahue v. Drexler, *supra*, the party assaulted brought an action to recover for personal injury, and the action was thereafter, by written agreement, settled between the plaintiff and defendant. Subsequently the party assaulted died from his injuries, and, under the above statute, the widow brought *her* action for the injuries done to *her* by the death.

In holding that she could bring her action entirely uninfluenced by the settlement by the party injured of *his* right of action, the court said:

"In this case we find two causes of action with dif-
"ferent purposes and reasons for their existence. The
"suit for assault and battery could not have survived to
"the personal representative, for the statute says it shall
"die with the person injured or injuring. It was a per-
"sonal action purely for bodily injury; not for pain,
"suffering and loss of service to his wife and children,
"after the injury and before death, and the compensa-
"tion which he had the right to was extinguished by
"his death, or the settlement which he made. But his
"right of action for the bodily injury from the assault
"and battery, is wholly distinct from the action which
"the widow and minor children may have for reparation,
"after injury resulting to them from the death. This
"statute creates a new grievance, a new cause of action

"in which neither the deceased nor his estate had any "interest, and for which his administrator could not sue. "It is based upon the wrong to the wife and children by "depriving them of their natural support and protection "which the law gives them in the husband and father.

"The injury is to them and their rights. They have "the exclusive right of action under the statute, and are "entitled personally to the results of any judgment "that may be recovered."

The case of Bowes v. Boston, 155 Mass., 344, 15 L. R. A., 365, also construes a statute, for the purposes of this question, identical with that of Idaho and Washington, and, if it be borne in mind that it contains no restriction or condition upon the right given, the conclusion of this case is the same as that of Donahue v. Drexler, *supra.*

Doyle v. Fitchburg, 162 Mass., 66; 25 L. R. A., 157.

We note the case of Southern Bell Tel. & Tel. Co. v. Cassin, 111 Ga., 577; 50 L. R. A., 694. This case is without weight as authority in this court.

It is in square conflict with the ruling of this court (Chesapeake & Ohio R. Co. v. Dixon, *supra)* in holding that the widow, children or heirs do not have an independent, separate and distinct right of action for the losses to them caused by the death from negligence. On this point also the decision is equally in conflict with a prior decision of the same court, namely, in Western & A. R. Co. v. Bass, 104 Georgia, 392. In

the Cassin case the court holds the Georgia statute to be a survival statute, and rests its conclusion that a release by the deceased bars the widow and heirs, on the authority of the many cases, heretofore considered by us, which hold such a release to constitute such a bar; but in all of those cases is to be found the peculiar language in Lord Campbell's act creating, not the survival of the right of action had by the deceased, but a *condition*, only upon which the widow and heirs might prosecute their own independent right of action for their loss. This language is not found in the Georgia statute and, hence, those cases are not authority for the holding of the Georgia court that a release, as a general rule of law, bars the widow and heirs. This is true of the case of Legg v. Britton, 64 Vt., 652, which the Georgia court says construes "a statute admittedly like our own." The statute of Vermont is not like that of Georgia, because it contains the peculiar language of Lord Campbell's act creating a condition upon which must be exercised the right of action given to the widow and heirs, and it is on that language that the Vermont court bases its conclusion, for it says: "*The language used* clearly gives the same "right of recovery which would have existed in the "intestate if death had not ensued, and as clearly holds "the wrongdoer liable the same as he would have been "if death had not ensued."

The Georgia statute has peculiar language of its own, not found in the Idaho and Washington statutes, which tends to turn the Georgia statute from a death statute

into a survival statute. "In the event of a recovery by "the widow, she shall hold the amount recovered sub- "ject to the law of descents just as if it had been per- "sonal property descending to the widow and children "from the deceased." The Georgia statute does not permit the recovery by the widow or children of *their* actual losses, but provides for the recovery of the "full value of the life."

Further, it is submitted that the reasoning of this case is an argument *ab inconvenienti*, and where that is not resorted to, rests on the Biblical theory of the unity of man and wife, and entirely overlooks the modern legal emancipation of the woman. Finally, the actual language of the statute itself is nowhere discussed in the opinion.

The case of L. & N. Co. v. McIlwain, 98 Ky., 700, is cited in the Cassin case as upholding the conclusion reached there, but it aids not at all in construing the statute of Idaho or of Washington. The statute of Kentucky there construed is a survival statute. The personal representative "may institute suit and recover "damages in the same manner that the person himself "might have done for any injury where death did not "ensue"; the proceeds, under the statute, go to the estate.

(2) INTERPRETATION OF CONTRACT.

The contract offered in evidence and pleaded (Trans., p. 784), purports to exempt the petitioner from liability for "injury to the person," but it is urged that it

exempts the corporation from liability for *death* also and that it should be read thus:

"The person accepting this free ticket agrees that the "Northern Pacific Railway Company shall not be "liable under any circumstances, whether of negligence "by agents or otherwise, for * * * killing * * * "the passenger using the same."

This written contract does not expressly release the carrier from liability for *death* of the passenger. The word death is not used in it, nor is any word which means death, nor is any word used signifying a condition from which death necessarily follows, or usually follows, or even so frequently follows as that there is any natural or rational implication of death from it. On the contrary, the expression "injury to the person," in its ordinary use, conveys the idea of a condition coexistent with life. In the ordinary use of the expression it implies life instead of death. If one were killed by violence, common usage would not describe the passenger's condition as that of "injury to the person," but as that of *death*, or that he was killed. If not *immediately* killed, common usage would say he had received "injury to his person," but would not stop there, for that would not express the actual condition, but would further say *and* from such injury he died. The condition of death would thus be entirely additional to "injury to the person" within the common acceptance of the meaning of these terms. Any one *intending* by the ordinary use of language to release another from

liability for killing him would, therefore, not stop short of expressing the exact condition intended. Certainly, if in any situation in life exact expression is called for, it is where one man is authorizing another in effect to take his life with impunity.

But the law has clearly defined the scope and meaning of these expressions, "injury to the person" and "death." In the law there is the same radical difference that exists in the natural meaning of the two expressions.

In the many cases where statutes have been passed providing for the survival of rights of action for "injury to the person," no court or legislature has ever held that this expression included and meant "death" *also*, but, on the contrary, to permit an action for death, invariably, notwithstanding a right of action already existed for "injury to the person," an additional act had to be passed providing a right of action for death as for an additional, distinct and different injury; and a right of action for "death" has been steadily held not to include a right of action for "injury to the person." Out of this independence of meaning in the two expressions grow the two statutes which obtain in many states, viz., "survival statutes" and "death statutes." All of the cases under the preceding heading are authority as to the legal meaning of these two expressions, to which we call attention. Out of them the following will very well illustrate the proposition.

Hulbert v. City of Topeka, 34 Fed., 510.

Missouri P. Ry. Co. v. Bennett's Est., 47 Pac. Rep., 183.

The question now discussed is that of the interpretation of a written contract purely; nothing more. And the ordinary rule applies that the intention is to be gotten from the language used. The meaning given the language by common usage, by natural interpretation and by legal interpretation, excludes a release of liability for death. Now where is the equity or extraneous circumstance which will warrant the court in doing violence to the language and in interpolating into the contract an additional term? When the corporation wrongfully injures a person and he thereafter dies therefrom and the law causes a right of action to survive for "injury to his person," the courts allow no extraneous circumstances to weigh in favor of those who own this right of action, even though it be the widow and children, and they be destitute, and even though the death be caused by wanton and reckless disregard of ordinary care. The expression in the law, "injury to the person," is kept within its normal meaning so as to exclude a recovery for the death. As contrasted with the widow's unavailing equity, we have the corporation pleading for the right to be free from liability for wrongfully killing a human being and for wrongfully causing the destitution of the widow. The corporation could not even say that it would be out under the contract if it were not released from liability for "death" in addition to "injury to the person," because, if the contract has any validity, the corporation received in return for transporting the deceased from Hope, Idaho, to Spokane, Washington, immunity from liability for "injury to

the person," and the deceased, in consideration of his transportation, relinquished his own right to sue if he survived, and under a survival statute, relinquished the right of his estate to sue for injury to his person if he died. A good consideration is some detriment to the promissee or some benefit to the promissor. This, as a consideration for the contract of carriage, was both, We are content to think that no violence will be done to the language of this contract in an effort to extend the immunity of a common carrier to negligent killing of passengers carried.

Clark v. Geer (C. C. A.), 86 Fed., 448.

In construing the contract, if there be some obscurity in its terms, the moral quality of the two constructions contended for is properly to be considered. If the petitioner was merely contending for the right under the contract to destroy goods with entire impunity, this rule, purely as one of interpretation, might not be applicable. There is nothing immoral *per se*, or *contra bonos mores*, in the destruction of goods by a common carrier. But in all time since the Almighty laid the law upon the world "Thou shalt not kill," the taking of human life has been a thing evil and pernicious in itself. Though the killing be done by negligence, it does not relieve the act of its essentially evil quality, and nations have recognized this by making negligent killing indictable and punishable. Hence the rule is clearly applicable here, that where there are two interpretations of a contract possible, one of which leads to essentially evil results,

and the other is more consonant with reason and justice, the latter will be adopted.

Coghlan v. Stetson, 19 Fed., 727.
Woodward v. Payne, 16 Cal., 445.

CONTRACT AS EVIDENCE OF DEGREE OF CARE DUE.

But if the contract could be held to extend to death, nevertheless the ticket and contract as evidence to show the status of the deceased or the degree of care to which he was entitled, that he "assumed the risks," were clearly irrelevant and immaterial.

If the ticket showed that he was carried free, nevertheless the deceased was a passenger and entitled to the same degree of care as other passengers and as if he had paid his fare.

Phila. & R. R. R. Co. v. Derby, 14 How., 485.
Steamship New World v. King, 16 How., 469.
Waterbury v. N. Y. C. & H. R. R. Co., 17 Fed., 67.

This is the duty of a common carrier to one voluntarily carried, and the contract on the back of the pass does not purport to change this duty, but recognizes it and provides that if the carrier violates *this* duty and the deceased suffers injury through such violation of this duty, the damages to which the deceased would be entitled through the failure of the carrier to give him the rightful degree of care need not be paid—"The com-"pany shall not be liable under any circumstances "whether of negligence" etc., that is, neglecting its duty.

There is no word in the contract that declares the carrier owes no duty, or that a failure to perform its usual duty or to give the usual care will not be *negligence*. On the contrary, the contract itself expressly fixes the status of the party using the ticket as that of a "passenger," and expressly states that, when the carrier has become guilty of "negligence," then it shall not be liable for the injury from such "negligence." The contract contemplates the failure of the carrier to perform a *duty* after it has gone into effect, and contemplates the carrier becoming guilty of *negligence* after it has gone into effect, and notwithstanding the making of the contract. If the "injury" to the "passenger" from such "negligence" were not wrongful it was not necessary for the contract to state that the carrier should not be liable for it. A release from liability for injury resulting from negligence, given *after* the occurrence, would not make the act otherwise than negligent, nor the injury otherwise than a wrong. A release from liability for the wrong *when it shall happen*, clearly has no different effect. It is the consequences of a wrongful act that are being guarded against. Petitioner admits (petitioner's brief, p. 13) that *some* care is owing notwithstanding the contract; it says it is only the *highest* degree of care which the contract provides the carrier need not give (petitioner's brief, p. 13), but petitioner fails utterly to show us how this apportionment of care is to be made. If releasing from liability for the injury consequent on negligence relieves from the duty to take the *high* degree of care, it relieves equally from the duty to take any care whatever; there

is no restriction or stopping place indicated in the contract. If the liability for the consequences of its "negligence" be the factor in the contract by which the degree or amount of care owing is to be determined, then *no* liability would logically indicate *no* care whatever; *some* liability *some* care. If there was *no* care due there could not be the "negligence," which is so clearly recognized and anticipated in the contract.

The petitioner is groping heavily in the dark. Its brief asserts that deceased was not a *passenger* as the reason why he was not entitled to the *highest* degree of care (petitioner's brief, p. 13), and yet the contract itself says he *was* a passenger, and the negligence which the contract anticipated the petitioner may become guilty of, is clearly, on the face of the contract, negligence in relation to deceased *as such passenger*.

This contract, further, does not state that the deceased "assumed the risks of traveling," or any of them, and the law of fellow servant is clearly inadmissible here. This contract is in marked contrast with the Voigt contract, where an assumption of the risks is expressly provided for. (176 U. S., 498.) It is further in contrast with the contract in the Voigt case in this, that it *is* provided in the latter that it shall cover death.

III.

"Assumption of the Risk," or Contributory Negligence.

On page 20 of its brief, petitioner seems to contend that outside of and in addition to the doctrine of contribu-

tory negligence, and outside of the law of master and servant, there is a principle of law to the effect that a person having knowledge of the unvestibuled condition of the platforms and crossing them with that knowledge, cannot recover for the negligence of the defendant in leaving the platforms uninclosed—or open at the sides; that passing over the defective way with knowledge of the defect, as a matter of law, is a plain case of "risk assumed by the deceased," and a bar to a suit for the negligence occasioning the defect and consequent injury. It is sufficient to say that the law knows no such doctrine. Whether the injured party's conduct, with knowledge of the defect, is a bar, must be determined by the law of contributory negligence and not otherwise. Mere knowledge of the defect when passing over the platforms is not, as a matter of law, a bar as being an "assumption of the risk."

Crane Elevator Co. v Lippert (C. C. A.), 63 Fed., 942.

Ind. & St. L. R. R. Co. v. Horst, 93 U. S., 291.

Kelly v. Blackstone, 147 Mass., 448.

Lawless v. Conn. River R. Co., 136 Mass., 1.

Looney v. McLean, 129 Mass., 33.

Harris v. Township, 64 Mich., 447; 8 Am. St. Reps., 842.

Nolan v. Brooklyn City & N. R. R. Co., 87 N. Y., 62.

The Evansville & T. H. R'd Co. v. Crist., 116 Ind., 451.

Crossing the open platforms was not *per se* contributory negligence even though deceased knew them to be open.

McAfee v. Huidekoper (D. C. App.), 34 L. R. A., 720.

Ches. & O. R. Co. v. Clowes, 93 Va., 189; s. c., 24 S. E., 833.

Graham v. McNeil, 20 Wash., 466.

Werle v. Long Island R. R. Co., 98 N. Y., 650.

Vaslee v. Grant & C. Ry. Co., 16 Wash., 602.

Warner v. B. & O. R. Co., 168 U. S., 339.

Graven v. McLeod, 92 Fed., 846.

In the absence of an eye witness the law presumes that, at the time of the accident, the deceased was in the exercise of due care, and the burden of proof to the contrary, by a preponderance of the evidence, was on defendant.

Tex. & Pac. R. Co. v. Gentry, 163 U. S., 353.

Cameron v. Great Northern Ry. Co., 77 N. W., 1020.

Ind. & C. R. Co. v. Horst, 93 U. S., 291.

Phillips v. Mil. & N. R. Co., 77 Wis., 349; 46 N. W., 543.

The question was clearly one of contributory negligence and for the jury.

Richmond & Dan. R. Co. v. Powers, 149 U. S., 45.

Grand Trunk R. Co. v. Ives, 144 U. S., 408.

The jury was properly instructed that contributory negligence by deceased would bar the action. (Par's 30, 44, 45, 46, 47, Trans., pp. 812, 819-821.) No exception was taken to these instructions to the jury to consider the conduct of deceased in relation to contributory negligence, instead of in relation to "assumption of the risk," and no instruction was requested on the latter. (Trans., pp. 825-830.)

In view of the insistence by petitioner upon the "assumption of the risks" proposition, we state the facts showing the conduct of deceased.

The deceased left the smoking car to go to the diner shortly after the train left Hope, and while the train was going at a moderate rate of speed. (Trans., pp. 90, 91, 94, 104, 105, 116.) The *usual* rate was moderate rom Hope to Sand Point. (Train Schedule, exhibit A6.) He did not leave the smoker until after the conductor had taken up his fare. (Trans., pp. 387-391.) The train went at moderate speed until it reached about the east end of the Pack River trestle (Trans., pp. 90, 91, 94, 104, 105, 116), which point was about four miles from Hope. In order for the deceased to have gotten from the smoker into the diner, and to have transacted his business there, and to have started back by the time the train reached the point where his body was found, it was necessary for him to leave the smoker shortly after leaving Hope, and before the train reached the east end of the trestle. He was a short, heavy man, and necessarily moved slowly. (Trans., p. 216.) He had to go from the front end of the smoker back to its rear end, open

and close the door of the smoker, cross the platform of the smoker and the platform of the adjoining day coach, open and close the door of the day coach, passing within, pass down the length of the day coach, open the door of the day coach, pass out, close it, cross the platform of the day coach, cross the platform of the tourist sleeping car, open the door of the tourist sleeping car, pass in, close the door, pass down the length of the tourist sleeping car, open the rear door of the tourist sleeping car, pass out, close it, cross the platform of the tourist sleeping car, cross the platform of the dining car, open the door of the dining car, pass within, close the door and pass to the center of the dining car, where he took a seat; during all of which the train was rolling on. He then had a conversation with the waiter in the dining car, telling him that he desired cigars. (Trans., pp. 475-490.) The conductor of the dining car was absent, and the waiter went back half the length of the dining car, opened the rear door, passed out, closed it, crossed the rear platform of the dining car, crossed the front platform of the Pullman sleeper, opened the door, passed within, closed the door, and passed down a part of the length of the sleeping car until he found the conductor of the dining car. The waiter then told the conductor of the dining car that there was a gentleman in the dining car who wished cigars; the conductor of the dining car then returned with the waiter, going part the length of the Pullman sleeping car, the door of which the waiter opened, and the conductor passed through, crossed the two adjoining platforms, opened the door of

the dining car, passed within, and passed half its length forward to where the deceased was sitting, who rose to meet him. A conversation then took place in which the deceased stated that he wanted cigars and indicated the kind he wanted; the dining car conductor then went back to the locker in which the cigars were kept, the door of which was locked, took from his pocket a bunch of keys and selected therefrom the appropriate key, unlocked the door, found within, from the various boxes of cigars, the box containing the kind of cigars which the deceased desired, and returned with them to the deceased, who thereupon gave the conductor a quarter in payment. Thereupon the deceased turned and walked slowly forward half the length of the dining car, opened its front door, passed out and closed it. (Trans., pp. 475-490.)

During all of this progress through the train, and the waiting for the conductor in the dining car, and the transaction of the business there, the train was rolling on, and, at the time the deceased turned from the conductor of the dining car to go forward, the train was off the west end of the Pack River trestle. (Trans., p. 482.) It is manifest that for a heavy man, over 200 pounds, to make such a journey through the train, wait in the diner as he waited, and be through with his business in the dining car just after the train left the west end of the Pack River trestle, he must have left the smoking car shortly after the train left Hope, and a considerable time before high speed was developed, and he had no warning which could have induced him to keep his seat in the smoker. The high

speed began about the west end of the Pack River trestle (Trans., pp. 105, 117, 118); the train was going fifty miles an hour just west of the trestle (Trans., pp. 117, 118, 105, 106), and from that up to sixty miles an hour at the point where the body was found. (Trans., pp. 104-106, 117-118, 128-134, 94, 95.) From the west end of the Pack River trestle to the point where the body was found was one mile and 3,480 feet, or forty feet less than one mile and two thirds. (Trans., pp. 191, 192, 142, 145, 149, 150, 187, 188, 175-180.) The train, therefore, ran, after the high speed developed, a mile and two-thirds with the deceased on it, and ran that mile and two-thirds at from fifty to sixty miles an hour, according to the testimony. If we make a conservative average of the testimony, and say fifty miles an hour, we have nearly two minutes consumed in running from the west end of Pack River trestle to the point where the deceased was thrown from the train, and, therefore, the very high speed was in operation not quite two minutes before deceased was thrown off. During a part of this two minutes the deceased had his mind occupied in the purchase of the cigars from the dining car conductor, and it was, during all the time, fixed on returning to the smoking car where his overcoat was left and his friend awaited him. The sharp curves, such as would produce lurching and might call an ordinary traveler's attention to excessive speed, were some little distance west of the west end of the Pack River trestle. Immediately east of the curve at which the deceased was thrown from the train is a tangent, a perfectly straight piece of track,

990 feet in length, on which the train would run steadily without lurching or lateral motion. (Trans., p. 190.) Now, under these circumstances, it is seriously urged that this court will usurp the functions of the jury and will conclusively presume that within this flash of time, the deceased did fully realize and know that the defendant had raised its speed to a dangerous pitch, and would maintain it at such point, so that it would be perilous for the deceased to return to the smoking car. To so assume that he would have known within this brief space that the speed was such as would put him in peril in crossing the platforms, charges the deceased with an instantaneous perception of changes in the condition of speed *and the reaching of the danger point*, which is not had by mankind at large. This is a matter also which one not connected with the train would be slow to give his attention to, it not being his duty to notice and observe such matters, nor is he charged primarily with his own safety in regard to them. He had the right to be slow to realize that the train would be run at such speed as to put passengers, while rightfully conducting themselves upon it, in peril. The dining car conductor, a railroad man of long experience, evidently did not realize, at the time deceased left the dining car, that the running of the train had been so changed in that scant period as to make the ordinary uses of it attended with peril, for he watched the deceased slowly leave the car, which the open platform adjoined, without a word of warning. (Trans., pp. 481-483.) If however, the dining car conductor from his great familiarity with trains, and

with the duty on him of protecting passengers, had so quickly realized the change in the running of the train from a normal condition to one of danger to passengers, and if the deceased, notwithstanding the natural presumption and rightful reliance on the fact that the train men were doing their duty, might have been as quick as the expert to note such change and its import, the action of his mind to this effect and to the realization of danger, would have been clogged and stopped by the silence of the experienced and responsible dining car conductor, which silence proclaimed to him that what he was then doing, under that conductor's eye, might be safely done.

Even though the deceased can be held charged, at his peril, to know the rate of speed maintained each minute by the carrier, whose duty is to maintain a safe speed every minute, and must be further held to be able to apportion properly the increase of danger to each additional mile in the rate of running, yet, nevertheless, with a space of only two and a half or three feet to cross, with the invitation of the carrier to cross it, with the conductor looking on without warning or objection, and with the air brake to moderate the lurching at the curves, the failure to use which the deceased could not anticipate, with the exercise of care by the deceased in crossing (he was exercising care when last seen, Trans., pp. 482, 484), having been induced to go to the dining car by the rightful presumption that he might return to the smoker safely, his overcoat and companion being in the smoker, and the dining car being neither a smoking car or a sitting car—the doing of the act does not import

such peril as to make it, under these circumstances, an unreasonable act for an ordinarily prudent man to do, and it is certainly not, as a matter of law, negligence.

Mere knowledge of the greater speed maintained, if the deceased had it, does not make the question one for the court. It is still a question for the jury whether, *in view of all the attending circumstances*, going back to the smoker was negligence (Authorities, *supra*, pp. 49-50).

If it be assumed that the increased volume of sound, as the deceased took the step across the narrow platform, necessarily told him that the platform was not vestibuled, it would not necessarily have told him that the carrier had defaulted in his whole duty and had not put a chain, or rail, or iron gate at the sides of the platform.

In taking the step across the platform, on a moving train, a careful man necessarily fixes his eye directly in front of him on the rail or object which he intends to grasp to steady himself, and does not look to the sides of the platform. This is common experience, and the deceased may well have crossed the open platform without acquiring the knowledge that it was not guarded by rail, chain or gate, as it should have been, and he therefore cannot be held charged with the knowledge that the platforms were *entirely* unguarded. In this connection also the facts are pertinent that deceased's eyesight was not good (Trans., p 213), and it was a cloudy day and growing dark. (Trans., pp. 100, 101, 108, 114, 260, 261.)

All of the many circumstances bearing on whether the deceased was guilty of negligence or not, have been

passed upon by the jury; the judge who heard the evidence and saw the witnesses refused a new trial. There was no error in this question going to the jury.

Sioux City & Pac. R. R. Co. v. Stout, 17 Wall., 657.

IV.

The Cause of Death.

Petitioner's complaint that there was not sufficient evidence to enable the jury to determine how the deceased came to his death, seems hypercritical in the extreme.

The rule in one of the cases forced on the attention of the court below on behalf of the petitioner in this connection, was thus stated:

"The circumstances themselves must be shown, and "not left to rest in conjecture; and, when shown, it must "appear that the inference sought is the only one which "can fairly and reasonably be drawn from these facts."

Ruppert v. Brooklyn Heights R. Co. (N. Y.), 47 N. E., 971.

It is of very little moment, in determining the sufficiency of evidence in a given case, that other evidence in other cases was held insufficient. It is with the facts shown in the case at bar that we are concerned.

There being no eye witness to the death, circumstantial evidence is necessary to prove the manner of it. We state the facts actually shown and not left to

conjecture, from which there is but one fair and reasonable inference to be drawn, viz., that deceased was killed by being thrown from the open platform by the lurching of the train and by falling upon the rocks below.

The theory of suicide is excluded by all the circumstances shown in the record as surrounding the domestic life of the deceased (Trans., pp. 205-234), by his professional standing (Trans., pp. 287, 290, 286, 274), by the circumstances attending the trip to Hope and the return up to the time of his disappearance, and by the presumption of law against suicide.

Standard Life and A. Ins. Co. v. Thorton, 100 Fed., 582.

Had the deceased gone off any other platform than one of the two open ones, he would have left the door open, and no effort was made by the defendant, whose employees had charge and continual supervision of the train, to show any such condition.

Death from assault by another person is excluded as follows: There is no evidence of enmity. There was no robbery; he carried little money and his watch, money and other property was on the body when found. (Trans., pp. 210-215, 714.) The wounds were not made by pistol, or sharp instrument, were very numerous and in number and character were such as would naturally be made by the body striking several times on the rocks, when thrown from the train. Defendant, who had the control, inspection and cleaning of defendant's cars, did not attempt to show any blood on any of defendant's

cars, which would naturally have been there from the many wounds on deceased had they been inflicted on the train. The law will not presume, for the benefit of defendant, that a crime has been committed on its train. To create such a defense it must prove the fact. The presumption is the other way.

Timson v. Moulton, 3 Cushing, 269.
Hewlett v. Hewlett, 4 Edw. Ch., 7.
Savier v. Chipman, 1 Mich., 116.

The body was in the following condition: The nose was mashed down to the face, the upper lip cut through, one eye destroyed and collapsed, the skull broken and a piece sheared off, being contained in a large flap of scalp partly detached from the head, fracture of the base of the skull, a wound in the scalp on the back of the head, both bones of the left forearm broken, the hand bruised and swollen, noticeable on the inside, contusions on the surface of the limbs, and a wound in the back of the chest to the left of the spinal column, ragged at the edges, which wound communicated with the interior of the chest cavity, and the lungs, heart or large blood vessels within the chest were ruptured. A piece of bone, together with some blood, was found on one of the rocks, showing how the wounds on the head were inflicted. The wound in the back was a three-cornered or triangular ragged wound, with the evidences of being punched by a rough blunt object, the triangular flap being pushed into the wound by the punching object. The object most accurately fitting this wound would be

a broken, rough, pointed triangular piece of rock. There was much broken rock on the ground. The terrific impact with the rocky ground of a body weighing over two hundred pounds, and hurled with the momentum of a heavy train running at fifty or sixty miles an hour, or less, would readily rupture the vital organs in the chest, though there were no external wound in the chest wall. These traumatic conditions caused death. (Trans., pp. 234-243, 265-269.)

Death from natural causes is excluded by the fact that the deceased was in perfect health (Trans., pp. 216, 268), and that immediately before his death he appeared in perfect health. (Trans., p. 95.)

Now, in addition to the foregoing facts, the jury had the following affirmative facts shown from which to find the manner of the death:

After passing Pack River trestle, and just before reaching the point where the body was found, which was only one mile and 3,480 feet from Pack River trestle (Trans., pp. 191, 192), deceased left the dining car with the cigars for himself and friend, going toward his friend and the smoking car. (Trans., pp. 480-484.) The car next the diner in front was the tourist sleeping car with two open unguarded platforms, over which deceased had to pass to reach his friend and the smoking car. Deceased was never seen on the train or alive after stepping from the diner toward these open platforms. The train was running over the track opposite where deceased was found in the neighborhood of sixty miles an hour, and, whatever the exact speed, so fast as to make the

cars lurch violently at the curves. The greater the speed and the sharper the curve the more violent the shock when the flanges of the wheels hit the sides of the rails and the train deviates from the straight line. (Trans., pp. 660-663.) This is common knowledge. Six degrees of curvature was the highest curvature between Hope and Spokane; the curve where the body was found was a six degree curve, very sharp. (Trans., pp. 303, 189, 190, map marked defendant's exhibit A 3.) It is usual when going fast to steady the train at curves and reduce the lurch by setting the air brake; the air brake was not set at this curve and the full force of the lurch remained unbroken and operated on the deceased unchecked. (Trans., pp. 351-354.)

The body was found 108 feet in a diagonal line from a point on the track where the indications on the ground showed it left the train, and 64 feet at a right angle from the convexity of the curve (Trans., pp. 142-151, 175-178, 187-191, plaintiff's exhibit "C 2"), showing the tremendous force communicated to deceased on the train and the great speed and lurch necessary to produce it. The tendency of the human body is to swing to the convex side of the curve when the train strikes the curve. (Trans., pp. 657-663.) The body was found on the convex side of the curve where it naturally would be under the working of this rule; and the hat, cuff and other property of deceased was scattered along on the same side of the track. The hat, being lighter than the body, had received less momentum from the train and was, therefore, east of the body and nearer the track. (Trans.,

pp. 144-149, plaintiff's exhibit "B 1," 186-196, exhibit "C 2," and photograph marked exhibit ....., 709-714, 732, 733.) The point on the track where the indications on the ground tended to show deceased left the train, was 125 feet from the beginning of the curve (Trans., pp. 188, 190, plaintiff's exhibit "C 2," 144-146); his hold was therefore broken and he was tossed into space within an instant after the wheels engaged the curve and the shock was communicated to the car. His broken left arm (Trans., p. 240), his left hand bruised on the inside (Trans., pp. 240, 210), the ring which was on the left hand and which was broken and scarred also on the inside (Trans., p. 210, plaintiff's exhibit "R"), and one cuff pulled off, point to an instant of struggle to maintain his hold before the impetus of the lurch of the train and the swing outward of the body disengaged his hand.

It is urged that deceased had a "sudden fit of illness" or "stubbed his toe." His actual good health and his appearance of it immediately before he was thrown from the train (Trans., p. 95) rebut both conjectures. But, assuming that he became sick, we are not aware that the duty of the carrier, to exercise the highest care for the safety of his passengers, extends to them only when in a state of perfect health. A state of sickness does not necessarily end in death. The presumption is in favor of the continuance of life. Thousands of men have lived useful and long lives after suffering such ills. Nor can a man be charged with contributory negligence, or with "assumption of the risk," through becoming sick, or through stubbing his toe. In the event of either

condition a gate or vestibule would have saved deceased from death on the rocks, as probably would have done a chain or bar.

It is submitted that the "inference sought is the only one which can fairly or reasonably be drawn from" the facts shown in this case, viz., that from an open platform, by the lurching of a car at a curve, the deceased was thrown and killed, and that the jury was fully warranted in so finding.

Cameron v. Great Northern Ry. Co., 77 N. W. Rep., 1020.
Texas & Pacific R. Co. v. Gentry, 163 U. S., 353.
Felton v. Newport, 105 Fed. Rep., 332.
Home Benefit Ass'n v. Sargent, 142 U. S., 691.
McAfee v. Huidekoper (D. C. app.), 34 L. R. A., 720.

The demand for a peremptory instruction, which raises whatever questions this court can consider relative to the sufficiency of the evidence, is equivalent to a demurrer to the evidence and admits all the facts plaintiff's evidence tended to show, as the high speed, the violent lurching at the curves, the points on the ground where deceased struck and lay, and the distances, etc.

Parks v. Ross, 11 How., 373.

"The case should not have been withdrawn from the "jury unless the conclusion followed, as a matter of "law, that no recovery could be had upon any view

"which could properly be taken of the facts the evi-
"dence tended to establish."

Tex. & Pac. R. Co. v. Cox, 145 U. S., 593.
Dunlap v. Northeastern R. Co., 130 U. S., 649.
Standard & Life Accident Ins. Co. v. Thornton, 100 Fed. Rep., 582.

But it is not within the province of the court to review the evidence in the record, to determine whether or not the inference drawn by the jury from the evidence was a reasonable one, or the only one that might fairly and reasonably be drawn, or to consider the weight of evidence, or to determine whether the jury was warranted in reaching the conclusion that the defendant caused the death of the deceased. The great speed and lurching, the open platform, the deceased being last seen stepping toward it, the sharp curve and the relation of the body to it, was, by itself, certainly *some* evidence tending to show the way the deceased was killed irrespective of the balance of the evidence on this point.

"It is not for us to decide that the jury brought in a
"wrong verdict under a correct charge, if the record
"shows, as it does, that there was *some* evidence to
"support the finding which was made."

Chicago & N. Ry. Co. v. Ohle, 117 U. S., 123.
Hepburn v. Dubois, 12 Pet., 375.
Zellers Lessee v. Eckert, 4 How., 289.
U. S. Express Co. v. Ware, 20 Wall., 543.
Barreda v. Silsbee, 21 How., 146.
Gregg v. Moss, 14 Wall., 564.

The impropriety of the court interfering with the verdict of the jury, is emphasized by the fact that a motion for a new trial was made and argued below, upon the ground of insufficient evidence to support the verdict, and the motion was overruled by the judge who saw and heard the witnesses testify.

Miller v. Bean, 13 Wash., 516.
McDougal v. Walling, 19 Wash., 80.

V.

Petitioner's Negligence.

ABSENCE OF VESTIBULE APPLIANCE.

It had been long the custom of the defendant to carry on its through trains, for the use and convenience of passengers, a dining car where meals were served, and where also cigars and liquors were served to those wishing them. (Trans., pp. 479, 481, 58, par. 4.) This car was advertised as being carried on these trains for the use of passengers. (Trans., pp. 271-273, 280-283.) The conveniences of the dining car were extended to the passengers at all hours, whether at meal-time or otherwise, and whether the train was in motion or otherwise, sales being made to them at all times except late in the evening when the train crew needed the car for sleep, and the passengers commonly and customarily used this car at all hours, going to and from it without restriction or interference of any kind whatsoever. (Trans., pp. 155, 275, 276, 277, 278, 182, 183, 290, 291.)

The deceased was acting upon the invitation of the defendant, held out to its passengers by prolonged custom and practice, and by its advertisements, and using the dining car for the very purpose for which it was carried, and in the appropriate and long established manner.

At a time when, in the development of railway carriage, there was no dining car carried on the train, and the train stopped at eating stations, and passengers were not invited or expected to pass from car to car, but, on the contrary, were warned to keep off the platforms, the cars then used, the platforms being left unguarded, were sufficiently safe in connection with the method of travel then in vogue.

When the carrier, however, in keeping up with modern progress, adopted a different or changed method or system of transportation, it became obligatory upon him to make the additional means adopted by him to carry on the changed system or method such that they could be used with safety by the passengers for whose use they were employed. Having adopted the method of feeding the passengers upon the train, and having adopted and put in use a dining car for that purpose, and having arranged for the passengers in all the other cars to pass to and from it, in order to use it, at all hours whether the train was moving or otherwise, it became the unquestionable duty of the carrier to make such use of it by the passengers safe. It undertook to carry them while in the passenger car, on the platforms going to the dining car, and in the dining car. Its duty was to

carry them, *wherever* it undertook to carry them, safely. To put it differently, the carrier, after the adoption of the dining car system, carried its passengers on a train in contradistinction to carrying them, as theretofore, on a car. When passengers were riding, therefore, on the train, in the manner provided for by the carrier, it became the duty of the carrier to make the train safe for the purposes to which he devoted it.

The dining car was carried in front of the Pullman sleeper, behind all the other cars on the train. The tourist sleeping car was immediately in front of it. (Trans., pp. 386, 84-87.) All of the passengers on the cars in front of the diner, were compelled, in reaching it, to pass over one or both of the unvestibuled and unguarded platforms, of the tourist sleeping car. It is patent to a very low order of understanding that these platforms, over which passengers passed while the train was in motion to reach the dining car, would be much safer if enclosed at the sides by means of the vestibuling device, than when open at the sides. The vestibuling device makes the train, so far as communication with the outer world is concerned, one car from end to end, and renders impossible falling therefrom. Disputing that very great additional safety lies in the vestibuling device to passengers passing to and from the dining car, is not compatible with reason, and even defendant's witnesses were compelled, by force of persistent cross-examination, to admit it. (Trans., pp. 156, 157, 84-87, 657, 535, 536, 547, 571, 572, 588, 589, 602, 617, 624, 625, 639, 643, 644.)

This vestibuling device had been in known practical

use upon railway passenger cars and trains for certainly six or seven years prior to the 13th day of November, 1898 (Trans., pp. 156, 528, 544, 554, 555, 581, 584, 598, 608, 609, 59, par. 5), and was in known practical use at that time, and was in use and operation on this very train on all the passenger cars with the exception of the tourist sleeping car. (Trans., pp. 84-87.) Its common and established use and steady and continuous adoption, and its patent effect in protecting the passenger in passing from car to car had, at the date of this disaster, long taken it out of the realm of uncertainty and speculation as a safety-adding device to passenger travel.

The railway passenger carrier is bound to use on its cars the best appliances in known practical use that increase the security of the passengers; and it is bound to adopt the best means or appliances in known practical use which increase the safety of the passenger, in view of the method or system of transportation employed by it—that is, in the case at bar, the appliances giving the most safety in using the dining car.

N. J. R. R. & Trans. Co. v. Pollard, 22 Wall., 341.
Pa. Co. v. Roy, 102 U. S., 451.
Treadwell v. Whittier, 80 Cal., 592-593.
Caldwell v. N. J. Steamboat Co., 47 N. Y., 282.
Meier v. Pa. R. Co., 64 Pa. St., 225.
Hegeman v. West R. Corp., 13 N. Y., 9.

It is not possible to question the application of this rule in the case at bar. The rule might be evaded possibly in other cases by showing that the appliance did not add to

the safety of the passenger, or by showing that, by the exercise of the greatest diligence, it was a physical impossibility for the carrier to have adopted the appliance. Neither excuse exists in the case at bar. The additional safety from the appliance is admitted by all. The fact that the deceased would have been alive today had it been in operation, cannot be questioned, and Mr. Gilbert, the superintendent of the defendant company at Spokane, himself admitted the additional safety (Trans., p. 657), and his testimony clearly shows that the *convenience* of the defendant was the only reason why it had not been put upon the tourist sleeping cars. (Trans., pp. 653-657.) Substantially the only defense on this point attempted was that other roads in the country were guilty of the same negligence. (Trans., pp. 522-644.)

ABSENCE OF ANY GUARD TO PLATFORMS OF TOURIST CAR.

But, irrespective of this time-honored rule requiring the adoption of safety adding appliances, the action of the defendant in sandwiching the tourist sleeping car in the train so as to compel passengers of necessity to pass over its open platforms in going to and from the dining car, is glaring negligence. All kinds of people used the dining car, children, old people and women. The record shows it was no unusual thing to go around six degree curves at fifty miles an hour. (Trans., pp. 355, 361.) It further shows that when the flanges of the wheels of the car strike the side of the rail at the beginning of a curve there is a jar or jolt, and that the greater the speed the greater the jar or jolt of the car

(Trans., pp. 660-663, 105, 118, 119, 131, 426), and the tendency of the human body to swing outward from the train toward the convexity of the curve as the train rounds it is common knowledge.

We have here a narrow bridge from car to car, not stationary, but oscillating, and more or less unsteady and uncertain to the foot, particularly as cars strike the beginning of curves. If this narrow bridge were stationary over a chasm in the earth, and a fall from it would mean death or serious injury upon the rocks below, to leave it unrailed or unguarded on both sides, all conditions of people having to pass over it, immediately strikes the mind as negligence showing a reckless indifference to human life and limb; but in the case of this unsteady bridge, unguarded at the sides, to which there is communicated from time to time a sudden jar or jolt, by the wheels hitting the curve, and upon which the equilibrium of the passenger is further overthrown outward from the convexity of the curve, any human being, child or adult, railroad man, or otherwise, sees, and must see clearly, the likelihood or probability of one passing at such a time falling and being mangled or killed. The lowest order of foresight and diligence for the care and safety of the passenger would foresee and guard against this danger.

The rectifying of this dangerous condition would have been a matter of extreme simplicity with insignificant expense of time, labor or money. An iron chain, of the value of a few cents, attached to the end of the body of the car and stretched across the side of the platform to

the railing at the end of the platform, would have saved this life. A wooden rail, which the average man could make with a jack knife and, with a hinge, two screws, a hook and a screw driver, attach to the end of the body of the car and let down across the side of the platform to the iron rail at the end of the platform, would have saved this life. A farmer sees a broken place in his fence and knows that his stock may get through into his neighbor's turnips, and knows that he will be guilty of negligence if he allows it to go unrectified, and he takes a piece of fence rail, or old board, and fills the hole. The care and the means resorted to by the farmer to avoid negligence on his part, and to save his neighbor's turnips, if resorted to to fill the hole in the side of this train, would have saved this life. Any of these simple means could have been applied within fifteen minutes at any station at which the train stopped after leaving St. Paul, or could have been applied while the train was in motion.

The record discloses that there are in known practical use, to enclose platforms of passenger cars, light iron gates, open work, and, in the nature of things, cheap, which are secured on to the end of the car, and very little expense, and very little time and insignificant labor would have applied these gates to that tourist car, and this life would have been saved. (Trans., pp. 589, 243-251.)

The tourist sleeping car could readily have been carried at the rear of the train, or in front of all the other passenger cars (Trans., pp. 531, 532, 554, 249),

and thus the passengers in all the other cars on this train would have been able to pass to the dining car without passing over the open platforms of the tourist car, and if this had been done the deceased would not have been killed. It is true that those in the tourist sleeping car would still have been exposed to danger if they went to the dining car, but comparatively few of them used the dining car, the tourist sleeping car being fitted with a cooking range, and arranged so that those thus carried can feed themselves in that car (Trans., p. 432); and in any event they would have but one open platform to cross, while with the tourist car in the middle of the train, all passengers in front of it would have to cross two.

In view of these facts, the defendant's contention that, while having arranged for passengers to pass to and fro over these platforms, and while knowing that they were so passing, it was no negligence on its part not to resort to any of the simple means that would have made the way to and from the dining car safe, is utterly untenable.

HIGH AND DANGEROUS SPEED.

The train was three hours and ten minutes late leaving Hope. (Train schedule, Ex. A6, and Trans., p. 312.) The usual or schedule time for this train from Hope to Spokane was two hours and twenty-five minutes. (Train schedule, Ex. A6, Trans., pp. 258-9.) The actual time consumed by it on the afternoon in question was one hour and fifty-five minutes, thirty minutes of the delay being made up in running the eighty-five miles

and a fraction between Hope and Spokane. It left Hope at 4.15 P. M. and reached Spokane at 6.10 P. M. (Trans., pp. 312, 323.) The distance between Hope and Sand Point, coming west, is sixteen miles. (Trans., p. 301.) The ordinary or schedule time for running this sixteen miles was thirty-five minutes. (Train schedule, Ex. A6.) This distance was run on the afternoon in question in twenty-four minutes (Trans., pp. 321, 322, 516, Train sheet, defendant's Ex. 2), or at an *average* of forty miles an hour from the instant of starting to the instant of stopping. Thus eleven minutes of the thirty minutes made up in the eighty-nine mile run were made up in this first sixteen miles. The speed was moderate out through the yards at Hope, and down to the east end of the Pack River trestle, a distance of about four miles. (Trans., pp. 104, 105, 116.) The train went at moderate speed over the trestle, 7,100 feet long (Trans., p. 300), until toward the western end. (Trans. pp. 315, 116, 104, 105.) There is an upgrade about two miles long just west of Oden, a station about midway between Hope and Sand Point. (Trans., pp. 303, 304.) The track from the west end of the Pack River trestle to Oden, which includes the point where the body was found, is substantially a dead level and was in perfect condition. (Trans., pp. 303, 304, 305, 730, 715, 716, 328.) The engine in use was capable of running one hundred miles an hour and had drawn a train at a speed of ninety-three miles an hour. (Trans., pp. 343, 344.) The engineer had, on previous occasions, driven his train over that piece of track and around the very curve

where the deceased was thrown off, by his own admission, as many as three hundred times at fifty to fifty-five miles an hour. (Trans., pp. 355, 361, 328.) He had often run from Hope to Sand Point in less time than on this occasion, and had once driven a passenger train between these points at an average of nearly sixty miles an hour from the instant of starting. (Trans., pp. 347, 348.) The reason attempted to be shown to support his statement that on this particular occasion he was going, at the identical point where the deceased was thrown off, at not over thirty-five miles an hour was that this dead level track had curves in it. (Trans., pp. 310, 311, 112.) From the top of the hill beyond Oden he increased his speed rapidly, by his own admission, on a down grade, over track containing curves, from forty-three or forty-five miles on up to sixty between there and Sand Point. (Trans., pp. 340-343, 303, 304, 299-301, map marked defendant's Ex. A3.)

Following these most significant facts, the government railway mail clerk, who had at the time of this disaster been in the government railway mail service for nearly three years, and at the time of the disaster had been running on the through train between Hope and Spokane for about eight months, and who was on the train in question, still in the government service and in the mail car, testified that high speed began about the west end of the Pack River trestle, and that, as the train left the Pack River trestle, it was going at the rate of fifty miles an hour, and that the speed was rapidly increased from that point until, by the time it

had gone a mile and a half west of the Pack River station, the speed had reached sixty miles an hour. (Trans., pp. 117, 118.) And he says further regarding the speed over this piece of track from which the deceased was thrown: "I never rode, before nor since, anything like that fast." (Trans., p. 120.) He further states that, from the excessive speed, the car in which he rode so lurched and oscillated at the curves that he was unable to perform his ordinary work, and was compelled to hold on to the car to keep from being thrown from side to side. (Trans., pp. 118-120.) He further says that in the run over this piece of track the car swung so violently that the mail bags piled on either side fell to the floor of the car. (Trans., p. 119.) This witness is a man of long experience on fast trains, holding a position of trust under the government, and we call attention to the whole of his testimony. (Trans., pp. 112-127.)

The witness Wickersham was in the employ of the Northern News Company, selling its goods on the Northern Pacific Railway, running between Helena and Spokane, and was on the train in question. (Trans., p. 127.) Just after the train left Hope he was warned by the brakeman that the train was going to make an unusually fast run from Hope to Spokane, and that it would not be safe for him to go from car to car and instead of proceeding with his business, on account of this warning, he sat down in the smoking car. (Trans., pp. 128, 129, 139, 140.) That within a mile west of the trestle he served a passenger in the smoking car with fruit, and the shaking of the car going about the curves

was so great as to make him sick. He had a long experience in riding on these trains, making ten trips a month from Helena to Spokane, and had been in the employ of the Northern News Company for over two years. (Trans., pp. 130, 131.) This witness further states that at the time he was serving the passenger in the smoking car, and was made sick, the train was running fifty-five or sixty miles an hour, and that over this piece of track from the trestle west to Oden it was usual, when the trains were late, to run fast in making up time, because the road there was smooth and level, an exceptionally good piece of road (Trans., pp. 132, 133), but that this trip over that part of the road, on the 13th day of November, 1898, was the fastest he had ever made there. (Trans., p. 133.) Owing to the speed and the motion of the train over curves, this witness, whose custom it was to go through the train after leaving Hope (Trans., p. 128), did not leave the smoking car between Hope and Sand Point. (Trans., p. 134.)

Mr. Jeannot, a merchant of Hope, Idaho, was on this train in the smoking car, and during the eight years of his residence in Hope had traveled to and from Spokane, over the Northern Pacific road, twice a month. (Trans., pp. 99, 100.) He noticed the increase of speed within half a mile after the train left the west end of the Pack River trestle, and states that within a mile west of the trestle the train was going, in his opinion, sixty miles an hour. (Trans., pp. 104-106.)

Mr. Gabbert, a mining man, who had traveled considerably over the Northern Pacific line, testified that

he was thrown against the end of the seat in which he sat by the swinging and lurching of the car, and that the speed was fast a short time after the deceased left the smoking car to go to the dining car. (Trans., pp. 93-95.)

If the positive testimony of these four disinterested witnesses, as to the high rate of speed at which the train was running and the extreme commotion in the train which this high speed produced along the track between the Pack River trestle and Oden, and at the point where the deceased was thrown from the train, be considered, together with the foregoing additional significant facts, it will be at once seen that the jury had ample evidence upon which to find that the train, at the point where the deceased was thrown off, was running at a very high and unusual rate of speed.

Whether a given rate of speed is negligence depends on the conditions under which it is maintained.

The defendant was running in the middle of its train, a car with open, unguarded platforms, with a standing invitation to the passengers to go over those open platforms at will to the dining car, and was charged with knowledge that at any moment such open platforms might be occupied by a passenger passing to such dining car. Instead of moderating its speed over the curves, that the lurching of the car might not throw such passenger from the open platforms, it plunged its train into this crooked track at an unusually high speed, so great that two experienced railroad men, to prevent themselves from being thrown or injured by the lurching of the cars at the curves, refrained from doing their

customary work, and the record discloses no warning given to the passengers of the intended high speed. Very ordinary care, in view of the actual condition permitted and suffered by the defendant of open platforms, and the passing thereover at will by the passengers, and the crooked track, demanded a slow rate of running. To run, under these circumstances, at high speed, such as produced the commotion noticeable in this train was, we submit, most pronounced negligence.

FAILURE TO USE THE AIR BRAKE.

Finally, on the question of negligence; putting on the air brakes, or "touching the air" as it is called, steadies the train going around a curve—makes the hind cars drag on the front of the train and tends to make the train a rigid whole. It takes the slack out of the couplings, puts them on the stretch, and so prevents lateral swaying and oscillation or lurching of individual cars.

The air brake was not put on at the particular curve where the deceased was thrown off, and the jolt or swing of the car he was on at that point was in no way controlled, though the means were at hand for that purpose, and the engineer was charged with knowledge that a passenger might be on the open platform at that spot. (Trans., pp. 351-354.)

A railroad company cannot act in disregard of the actual state of things which it permits or suffers. Its exhibition of care must be increased to meet the demands of such a state of things.

Lynn v. So. Pac. Co., 103 Cal., 7; 24 L. R. A., 710.

VI.

The Instruction that the Defendant Company owed to Plaintiffs the same duty it owed the Public Generally (Trans., pp. 811. 812).

The duty of the defendant, which all of these matters of negligence violated, is as follows:

The undertaking and liability of the railway carrier of passengers goes to the extent that the carrier and its agents shall, as far as human care and foresight can go, transport them safely. Such carrier must prevent injuries to passengers in the course of their transportation which may be avoided or guarded against by the exercise, upon the part of the carrier, of extraordinary vigilance and foresight, aided by the highest care. And this caution, foresight and vigilance must necessarily be extended to all the agencies or means employed by the carrier in the transportation of the passenger. For the slightest negligence or fault in this regard the carrier is liable.

Pa. Co. v. Roy, 102 U. S., 451.
Ind. & St. L. R. R. Co. v. Horst, 93 U. S., 291.
Trumbull v. Erickson, 97 Fed., 894.
Phila. & Reading R. Co. v. Derby, 14 How., 485.
Steamboat New World v. King, 16 How., 469.

That the duty which the carrier is under, to observe this rule and exercise the care exacted, is a public duty, a duty which he owes to the public, and does not rest on contract, is undoubtedly true.

Grand Trunk Ry. v. Stevens, 95 U. S., 655.
Chi. M. & St. P. R. Co. v. Solan, 169 U. S., 113.
Munn v. People of Illinois, 94 U. S., 113.
Phila. & Read. R. R. Co. v. Derby, 14 How., 468.

There was no possible injury to the defendant in the court's stating that it was the public duty which the carrier was bound to perform in this case, and not the duty it owed the deceased, inasmuch as the duty in regard to care owed by the carrier to the public and to the deceased was absolutely identical. And inasmuch as the carrier owes to the passenger the *highest* degree of care, any implication that the case might rest on other relations than those of passenger and carrier could not be to defendant's prejudice. The carrier's duty in regard to the care demanded in this peculiar case was very carefully and plainly defined by the court.

If there was any ambiguity in the instructions, the defendant should have had it corrected.

Ind. etc. R. Co. v. Horst, 93 U. S., 291.
Flanders v. Tweed, 16 Wall., 504.
Balt. & P. R. Co. v. Mackey, 157 U. S., 86.

Respectfully submitted,

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REESE H. VOORHEES,
Counsel for Louise H. Adams and Frank H. Adams.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

NORTHERN PACIFIC RAILWAY COMPANY, *Petitioner*,
vs.
LOUISE H. ADAMS and FRANK H. ADAMS. } *No. 466.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR LOUISE H. ADAMS AND FRANK H. ADAMS.

STATEMENT.

(The references to the Transcript are by the original or marginal paging.)

Jay H. Adams, the deceased, on the 13th day of November, 1898, went from Spokane, Washington, his home, to Hope, Idaho, and was returning therefrom in the afternoon of the same day, on a regular passenger train of the Northern Pacific Railway Company. The train left Hope at 4.15 p. m., being three hours and ten minutes behind time. (Train schedule marked Ex. A6, and Trans., orig. p. 312.) The train consisted of a mail car, baggage car, express car, smoking car, first-class day coach, tourist sleeping car, dining car and Pullman

sleeper, placed in the train in the order named. The cars in the train occupied by passengers were vestibuled throughout with the exception of the tourist sleeping car, neither platform of which was vestibuled, nor were the sides of the platforms of the said tourist sleeping car enclosed by means of gates, rods, chains, or any other device, but were entirely open, permitting unobstructed ingress and egress to and from such platforms at the sides. (Trans., orig. pp. 84, 85, 86.) A tourist sleeping car was customarily carried on the through passenger trains (Trans., orig. p. 392) of which the train in question was one, and the platforms of all such tourist cars were open and unguarded, as were those of the car in this train, the company having no tourist sleeping cars with vestibuled platforms. (Trans., orig. pp. 392, 649.) While customarily carrying a tourist sleeper in its trains, with such open and unguarded platforms, the company advertised to the public in three newspapers published in Spokane, all of which were taken and read by the deceased, including the advertisements, that its trains carried a dining car for the use of passengers, and a tourist sleeping car, and were entirely vestibuled throughout. These advertisements had appeared for months prior to the 13th day of November, 1898. (Trans., orig. pp. 271, 272, 273, 280-283, 212, 213.)

The deceased boarded the train at Hope, at the front end, by getting upon either the rear end of the smoking car or the front platform of the adjoining first-class day coach, both of which cars were vestibuled, and proceeded immediately forward in the smoking car, and took his

seat in the front part of it, being accompanied by a friend with whom he was traveling. (Trans., orig. p. 89.) And here it is proper to call attention to a misstatement of fact several times made by petitioner. On page 4 of its brief on the application for the writ of certiorari, and elsewhere, it is said:

"It is an established and uncontradicted fact that "they [referring to the deceased and a friend] got on to "the train by one of the unvestibuled platforms."

Mr. Gabbert, the friend of the deceased, swore positively that he and the deceased got on the train between the day coach and smoking car (Trans., orig. pp. 89, 95), and he remembered that the day coach was vestibuled, and he did not remember as to the smoking car. (Trans., orig. pp. 95, 98.) It is an admitted fact in the case that both smoking car and day coach were vestibuled. (Trans., orig. p., 85.) It is apparent, therefore, that the deceased and Mr. Gabbert, according to Mr. Gabbert's testimony, boarded the train by a vestibuled platform, that it was not admitted to the contrary, and that the above quoted statement is not correct.

Very shortly after the train started, and before any unusual speed had been attained, the deceased left the smoking car to go to the dining car to get some cigars for himself and friend. (Trans., orig. pp. 90, 91.) The deceased did go to the dining car and did purchase cigars, and after doing so left the dining car, in the direction of the smoking car and the friend with whom he was traveling. (Trans., orig. pp. 481, 484, 487, 60, par. 7.)

The dining car conductor saw him leave the dining car, and that was the last time he was seen alive by any person.

Very high speed was commenced about the west end of the Pack River trestle, reaching at the point where the body was found about sixty miles an hour. (Trans., orig. pp. 104-106, 116-121, 126-134, 94, 95.)

The deceased could not be found when the train reached Spokane. Search being instituted, his body was found, on the next day, lying on the rocks opposite a six degree curve in the track about six miles and 2,100 feet west from Hope (Trans., orig. pp. 190, 191), and one mile and 3,480 feet from the west end of the Pack River trestle. (Trans., orig. pp. 191, 192, 142, 145, 149, 150, 187, 188, 175-180.) The plaintiffs are the widow and son of the deceased. (Trans., orig. pp. 205, 209.)

BRIEF.

I.

The Relation of the Statutes of Idaho and Washington and the Contract between Deceased and Petitioner to the Rights of the Plaintiff.

(Assignments of Error 1, 16, 19, Trans., orig. pp. 836, 841, 842, 849.)

The contract on the back of the transportation alleged to have been used by the deceased at the time of his death (Trans., orig. pp. 64, 784), which contract purports to release the petitioner from all liability for injury to the person of the deceased, caused by the negligence of the petitioner, is void as against the plaintiffs:

(1) Because plaintiffs were not parties to such contract, and over *their* right of action for loss to *them*, deceased could exercise no control.

(2) Because the contract does not exempt the carrier from liability for death.

(3) Because the contract is void as against public policy.

(1) THE STATE STATUTES.

The plaintiffs have an independent, separate and distinct right of action for the losses to them occasioned by petitioner's negligence, which right of action the deceased could neither enjoy nor in any wise control.

The negligence of the petitioner, and the death of the deceased therefrom, both occurred in the state of Idaho. The statute of Idaho authorizing this action to be brought is as follows:

"When the death of a person, not being a minor, is "caused by the wrongful act or neglect of another, his "heirs or personal representatives may maintain an ac- "tion for damages against the person causing the death; "or, if such person be employed by another person who "is responsible for his conduct, then also, against such "other person. In every action under this and the pre- "ceding section, such damages may be given as, under "all the circumstances of the case, may be just." *(Revised Statutes of Idaho*, § 4100.)

The statute of Washington, in which state the action was brought, is as follows:

"The widow, or widow and her children, or child or "children, if no widow, of a man killed in a duel shall "have a right of action against the person killing him, "and against the seconds and all aiders and abettors, "When the death of a person is caused by the wrong- "ful act or neglect of another, his heirs or personal "representatives may maintain an action for damages "against the person causing the death, or when the "death of a person is caused by an injury received in "falling through any opening or defective place in any "sidewalk, street, alley, square or wharf, his heirs or "personal representatives may maintain an action for "damages against the person whose duty it was, at the "time of the injury, to have kept in repair such side- "walk or other place. In every such action the jury "may give such damages, pecuniary or exemplary, as, "under all the circumstances of the case, may to them "seem just." (*Ballinger's Annotated Code and Statutes of Washington*, § 4828.)

These two statutes are for the exclusive benefit of the heirs, and are not for the benefit of the estate of the deceased. The statutes of California and Idaho are identical, Idaho having adopted that of California.

Monroe v. Dredging etc. Co., 84 Cal., 515.
Noble v. Seattle, 19 Wash., 133.

It will be noted that, with the exception of four words in the Idaho statute, to-wit: "not being a minor," the language of the two statutes of Idaho and Washington

is identical where authorizing an action for death caused by wrongful act or neglect.

There is one proposition in the interpretation of this character of legislation in support of which there is a vast weight of concurrent authority, and that proposition is that Lord Campbell's act, and the many acts inspired by it in the various states of this country, including the two states of Idaho and Washington, create and grant to other persons than the deceased or his estate, an independent right to recover for the losses sustained by such other persons through the negligence of a party causing death, such right of action being separate and distinct from any right of action which the deceased had, or could have enjoyed had he survived.

The English interpretation of Lord Campbell's act is unmistakably to this effect. In *Blake v. Midland Ry. Co.*, 18 Q. B., 93; 10 Eng. L. & Eq., 443, Mr. Justice COLERIDGE says:

"The title of this act may be some guide to its mean-
"ing, and it is an act for compensating the families of
"persons killed, not for solacing their wounded feelings.
"Reliance was placed upon the first section which states
"in what cases the newly given action may be main-
"tained although death has ensued, the argument be-
"ing, that the party injured, if he had recovered, would
"have been entitled to a solatium and, therefore, so shall
"his representatives, on his death. But it will be evi-
"dent that this act does not transfer this right of action
"to his representative, but gives to the representative a
"totally new right of action on different principles.

"Section 2 enacts that 'In every such action the jury "'may give such damages as they may think propor- "'tionate to the injury resulting from such death, to the "'parties, respectively, for whom, and for whose benefit "'such action shall be brought. The measure of "'damage is not the loss or suffering of the deceased but "'the injury resulting from his death to his family.'"

In *Reed v. Great Northern R. Co.*, L. R., 3 Q. B., 555, there seems to have been some language used which has been pointed to by various courts since as showing a reversal of the interpretation in *Blake v. Midland R. Co.*, *supra*, but the same proposition was squarely held subsequently in *Leggott v. Great Northern R. Co.*, L. R., 1 Q. B. Div., 599; and the same ruling occurs again in *Robinson v. Canadian P. R. Co.*, decided by the house of Lords in 1892. An analysis of the English cases is found in *Brown v. Chicago & Northwestern R. Co.* (Wis.), 44 L. R. A., 579.

In our own country the construction put upon Lord Campbell's act in *Blake v. Midland R. Co.*, *supra*, has been widely followed. In the case of *Chesapeake & Ohio R. Co. v. Dixon*, 179 U. S., 131, this court construed one of these acts, as follows:

"Section 6 of the Kentucky statutes provides: 'when "'the death of a person shall result from an injury in- "'flicted by negligence or wrongful act, then and in "'every such case, damages may be recovered for such "'death from the person or persons, company or com- "'panies, corporation or corporations, their agents or

"'servants, causing the same; and when the act is wilful "'or the negligence is gross, punitive damages may be "'recovered and the action to recover such damages "'shall be prosecuted by the personal representative of "'the deceased.'

"The cause of action thus created is independent of "any right of action deceased may have had, or would "have had if he had survived the injury."

In *Gerling v. Baltimore & O. R. Co*, 151 U. S., 696, the court, considering the act of West Virginia, says:

"The right of action thus given although for the "same act or neglect for which the person injured "would have had a right of action in his lifetime, differs "from an action brought by him, both in the ground on "which it proceeds and in the award of damages. It is "not a common law action to recover damages for the "injuries suffered by him while he lived, but it is an "action given by statute for causing his death."

In *Hurlbert v. City of Topeka*, 34 Fed. Rep., 510, Mr. Justice BREWER, then on the bench of the federal circuit court, discussing the statute of Kansas, in substance similar to Lord Campbell's act, says:

"Section 422 gives a new right of action, one not ex- "isting before; an action which is not founded on sur- "vivorship: an action which takes no account of the "wrong done to the decedent, but one which gives to "the widow or next of kin damages which have been "sustained by reason of the wrongful taking away of

"the life of the decedent. It makes no difference whether "the injured party was killed instantly or lived months; "whether he suffered lingering pain or not; whether "or not he was put to any expense for medical attend- "ance and nursing. None of these matters are to be "considered in an action under 422; and the single "question is, how much has the wrongful taking away "of his life injured his widow or next of kin? It is an "action to recover damages for the death, and in no "sense a survival of an action which accrued to the de- "cedent before his death; whereas, on the other hand, "section 420 provides for the survival of an action which "the decedent himself had in his lifetime."

In *The Oregon*, 73 Fed., 846, construing the Oregon statute, the court adopted this rule and says:

"It is substantially like Lord Campbell's act; and in "the case of *Seward v. Vera Cruz*, *supra*, the view held "was (Lord Blackburn concurring) not that the cause of "action survived, but that 'a totally new action is given "'against the person who would have been responsible "'to the deceased if the deceased had lived; an action "'which, as is pointed out in *Pym v. Rd. Co.*, 4 Best. "'& S., 396, is new in its species, new in its quality, "'new in its principle, in every way new, and which "'can only be brought if there is any person answering "'the description of the widow, parent or child, who "'under such circumstances suffer pecuniary loss by "'the death.'"

In *Munroe v. Dredging etc. Co.*, 84 Cal., 515, the supreme court of that state, in discussing the statute of that state, which is written verbatim as the statute of Idaho, says, after quoting from *Blake v. Midland R. Co.*, *supra* :

"We agree with what is said in the opinion above "quoted that the action given by the statute is a new "action, and not the transfer to the representative of "the right of action which the deceased person would "have had if he had survived the injury."

In *Brown v. Chicago & Northwestern R. Co.* (Wis.), 44 L. R. A., 579, in construing the statute of Wisconsin, similar in substance to Lord Campbell's act, and also the statute of that state of survival of the right of action had by the deceased, the supreme court of that state says:

"The death loss act of the English statute (9 and 10 "Vic. C., 93) commonly called 'Lord Campbell's act,' "and the various laws of a similar kind that have been "modeled after it, give a new cause of action, unknown "to the common law, for the benefit of certain desig- "nated classes of surviving relatives. Such relatives do "not take the cause of action for damages to the de- "ceased by transfer to them by operation of law or "otherwise, but are enabled by statute to recover the "pecuniary loss to themselves caused by the wrongful "taking off of the decedent, the continuation of whose "life would have been beneficial to them. * * * But, "independent of that circumstance, as before observed,

"the language of the two provisions is plain; they re-
"fer to entirely distinct losses, recoverable in different
"rights; the one in the right of the deceased for the
"loss occasioned to him; the other in the right of the
"surviving relatives for the loss to them. * * * * *
"The liability of the wrongdoer * * * is * * * on
"a new right created by the statute—the right of sur-
"viving relatives to compensation for the loss which
"falls upon them."

As will be observed from the opinion of Mr. Justice BREWER in *Hulbert v. City of Topeka*, 34 Fed., 510, his views of the scope and effect of the statute of Kansas compensating loss by death, differed from the opinion of the supreme court of that state, expressed while Mr. Justice BREWER was a member of it, but the latest decision of the judiciary of that state, rendered by its court of appeals, refused to follow the supreme court, and is in accord with the views of Mr. Justice BREWER.

Mo. Pac. Ry. Co. v. Bennett's Estate, 47 Pac., 183.

In *Perkins v. New York Central Rd. Co.*, 24 N. Y., 200, the court, in construing the New York statute based on Lord Campbell's act, says:

"This is a new and original cause of action given by
"and dependent wholly upon the statute. The dam-
"ages recoverable in such case depend upon entirely
"different principles from those recoverable by the per-
"son injured in case death had not ensued from the in-
"jury. In such case the person injured would only

"recover compensatory damages personal to himself, "including expenses incurred and losses sustained in "consequence of the injury. (*Lincoln v. S. & S. Rd.* "*Co.*, 23 Wend., 425.) But in a case where death results "from the injury the pecuniary value of the life of the "person killed to the next of kin is the measure of dam- "ages, to the extent of five thousand dollars. (*Whit-* "*ford v. P. M. R. Co.*, 23 N. Y., 467; *Blake v. Midland* "*Ry. Co.*, 10 Eng. L. & Eq., 443.)"

To the same effect as the foregoing cases, are:

Adams v. N. P. Ry. Co., 95 Fed., 938.

Davis v. St. Louis I. M. & S. Ry. Co. (Ark.), 7 L. R. A., 283.

Jeffersonville R. Co. v. Swain, 26 Ind., 484-486.

Littlewood v. Mayor etc., 89 N. Y., 27.

Western & A. R. Co. v. Bass, 104 Ga., 392; 30 S. E., 874.

Vicksburg & M. R. Co. v. Phillips, 64 Miss., 693; 2 So. R., 537.

Hurst v. Detroit City R. Co., 84 Mich., 539; 48 N. W., 44.

Needham v. Grand Trunk Ry. Co., 38 Vt., 294.

Bowes v. Boston, 155 Mass., 344; 15 L. R. A., 365.

Commonwealth v. Met. Rd. Co., 107 Mass., 236.

Donahue v. Drexler, 82 Ky., 157; 56 Am. Rep., 886.

Fink v. Garman, 40 Pa. St., 95.

The Onoko (C. C. A.), 107 Fed., 984.

Roche v. Imperial Mining Co., 7 Fed., 703.

Re Mayo (S. C.), 54 L. R. A., 665.

It is manifest from the foregoing that the deceased during his life had no interest or right in the right of action granted exclusively to his heirs, which enabled him to release the petitioner from its liability for the loss to the plaintiffs, caused by petitioner's negligence.

There are many cases, however, both English and American, which hold that, unless the deceased had in him unimpaired a right of action, for *his* injuries, at the time of his death, his heirs could not enforce *their* right of action under Lord Campbell's act, and the acts of various states in this country having certain peculiarities in them found in Lord Campbell's act. In some of these cases it has been held that a release by the deceased during life of *his* right of action barred the heirs of *their* right of action.

It is patent that, having an independent right of action for *their* injury and loss under the statutes of Idaho and Washington, there must be found within the statutes creating such independent right of action an affirmative, positive restriction upon, or qualification of, its full enjoyment by the plaintiffs in order to bar them from its prosecution. In *Louisville etc. R. Co. v. Clarke*, 152 U. S., 240, this court, construing a statute giving right of action for death, said:

"The statute imposes no other condition upon the "right to sue. The court has no authority to impose "an additional or different one."

Herein lies the difference between the statutes of Idaho and Washington on the one hand, and Lord

Campbell's act and most of the statutes of the states of the Union relative to death by wrongful act, on the other. In the two former there is no language out of which any condition to or qualification of the right of action in the heirs or widow and children can be construed. In nearly all the latter, and in those under which the courts have held the heirs barred of their right of action because of a release given or judgment gotten by the party injured during his life, is found the same peculiar language found in Lord Campbell's act, which is held to make the prosecution of the independent right of action given the heirs, conditional upon the existence in the deceased of his right of action unimpaired at the time of his death. This peculiar language is entirely absent from the statutes of Idaho and Washington. It is as follows:

"The act, neglect or default is such as would, if death "had not ensued, have entitled the party injured to "maintain an action and recover damages in respect "thereof, then and in every such case, the person who "would have been liable, if death had not ensued, shall "be liable to an action for damages, notwithstanding "the death of the person injured."

Out of this language, or similar language, the courts have held that the act or acts being construed contained a *condition* to the prosecution by the heirs, of the independent and distinct right of action for their loss, and that only when the condition existed could they prosecute their right of action. Thus in *Brown v. Chicago*

& Northwestern R. Co. (Wis.), 44 L. R. A., 589, the court quotes the last expression of the English courts upon the construction of Lord Campbell's act, and adopts the view expressed as its own, as follows:

"The *language* of our statute is that liability of the "wrong doer exists where the deceased could have re- "covered if death had not ensued. * * *

"As I have before said, I am of opinion that the "action being of the same nature, and indeed the same "action in all respects, as that conferred by Lord Camp- "bell's act it must, as an action on that statute is con- "sidered in England, be deemed to be a new action, but "still a new action dependent on the *condition* that the "action of the deceased had not, at the time of his "death, been barred or extinguished."

Again in *Littlewood v. Mayor etc. of New York*, 89 N. Y., 24, which is a leading case in support of the proposition that the party injured may, by releasing the wrong doer from liability for injury to his person, bar his heirs of *their* right of action for the injury to them by his death, the court admits that the heirs have an independent and separate right of action for the losses occasioned to them by the death, and an entirely different right of action from any had by the deceased in his life time, and not a survival of any right had by him. But, while admitting this, the court holds, *because of the peculiarity of the language* heretofore quoted from Lord Campbell's act and found in the New York act, that it is clear that the legislature intended that only in the

event that the party injured had his right of action intact at the time of his death, could the heirs prosecute their right of action.

In another leading case, *Hecht v. O. & M. Ry. Co.* (Ind.), 32 N. E., 302, barring the right to recover for the death, by reason of recovery on his right of action during life by the deceased, the court, construing an act containing substantially the language above quoted from Lord Campbell's act, says:

"For *the act*, as we construe it, *clearly declares* that "the personal representatives of the injured party, when "death ensues, may maintain the action only in case "the injured party might, at the instant of his death "have maintained the action if he had lived. In this "case the injured party at the time of his death could not "have maintained an action for the same act or omission "had he lived; hence there is no right of action given to "his personal representatives by the statute."

And in *Sheriock v. Alling*, 44 Ind., 197, the court says:

"The right of action, which the deceased had at his "death, is not by the law transferred to his representa- "tives, but it gives to them a totally new one on differ- "ent principles * * yet *by the terms of the act*, no action "can be maintained under it, unless the act or omission "causing the death was such that the deceased might, "if alive, maintain an action for an injury caused by "the same act or omission."

The statute of South Carolina is verbatim Lord Campbell's act (*Tiffany, Death by Wrongful Act*, p

329), and *Price v. Richmond & D. R. Co.*, 33 S. C., 556; 12 S. E., 413, is one of the leading cases holding that a release of the railroad from liability for his injuries by the deceased during life bars the widow and children of *their* right of action for the death. The court says:

"But the construction which we have adopted seems "to us the only legitimate one which can be deduced "from the *terms of the statute*, and it has the support "of high authority."

Re Mayo (S. C.), 54 L. R. A., 665.

In the case of *Hill v. Pennsylvania R. Co.*, 178 Pa., 223; 35 L. R. A., 196, a release given the railroad company by the deceased during life, was held to bar suit by the widow for his death. Here again we find potent language in the statute, on which the decision rests, and which is entirely wanting in the Idaho and Washington statutes, and there are other pronounced differences. An action after death is permitted "Whenever death "shall be occasioned by unlawful violence or negligence, "*and no suit for damages be brought by the party in-*"*jured during his or her life*" etc. From this language and other features of the statute peculiar to it, the court construes it to merely to keep alive to certain specified persons the very right had during life by the deceased to recover for *his* injuries; that the widow could not recover under it in her own right for her own injuries; and that the deceased, having full power in life to prosecute this *his* own right of action, had also as "a neces-"sary incident to the right of ownership of the right of

"action," the right to settle it by release. None of the peculiarities of this statute on which the decision rests are to be found in those of Idaho and Washington.

In the case of *Lubrano v. Atlantic Mills*, 19 R. I.....; 34 L. R. A., 797, the court seems to hold that, under the act of Rhode Island containing language similar to that of Lord Campbell's act, where there is also an act providing for the survival of the right of action for the injuries suffered by the deceased, there is not given a separate and independent right of action to the widow and children of the deceased for the losses suffered by *them*, but that there is only a sort of a continuance or a survival of the right of action which the deceased had, and that after his death, notwithstanding the distinct survival statute, an action would not lie on behalf of the estate of the deceased and also on behalf of the widow and children.

This is in conflict with the great weight of authority heretofore cited, but if it were not, the reasoning pursued by the court does not invite reliance upon its conclusion. It says:

"Upon this principle the new remedy must be exclusive *since otherwise there would be two recoveries for the same cause of action* namely, the negligence of the defendant, which is the cause of action on which the deceased would have sued at common law, if he had survived."

In this case the court seems to esteem it a hardship on the wrong doer, from which the legislature *must* have

sought to save him, that the wrongdoer should have to pay damages twice for the same wrongful act, once to the party injured by being hurt physically, and again to another party injured by being deprived of support, maintenance, etc. This reasoning appears in several cases where the scope of the statute is restricted. In this view the damages are treated as a penalty or punishment and it is regarded in these cases as a harsh and unjust measure to punish twice for the same offense. If the sympathetic eye in these cases were not focused exclusively on the corporation, but were permitted to view the person injured and the widow and children, it would be readily seen that the damages recovered are not, except incidentally, in the way of punishment of the corporation but in the way of compensation for their losses.

We are not able to perceive why the corporation should not be liable to two parties, each injured by a single act of negligence, in these cases, with as much propriety as when by a collision from negligence, thirty forty or one hundred different people are injured by the same negligent act. In the latter case a court would hardly suggest that only one of these many injured persons could recover on account of the negligent act which had injured the many, or that a release by such one would preclude the other injured individuals from recovering for their loss through such negligent act. In the case at bar the widow and child are separate and distinct individuals, having separate and distinct capacities from that of the deceased to suffer loss, and through the act of negligence which also injured the deceased,

these plaintiffs have been made to suffer pecuniary loss. There is certainly nothing harsh or inequitable in the statute giving to people, wrongfully deprived of support, education, etc., their own right to recover for themselves the peculiarly personal loss thus sustained exclusively by them. Certainly the proposition is not so inequitable as to induce the court to impose an arbitrary condition to the enjoyment of this right, to support which condition there is no word in the statute.

Missouri Pac. Ry. Co. v. Bennet est. (Kan.), 47 Pac., 183.
Bowes v. Boston 155 Mass., 344; 15 L. R. A., 365.
Needham v. Grand Trunk Ry. Co., 38 Vt., 294.
Hulbert v. City of Topeka, 34 Fed., 510.
Hedrick v. Ilwaco R. & N. Co., 4 Wash., 400.
Brown v. Chi. & Northwestern R. Co. (Wis.), 44 L. R. A., 579, 585.
Louisville etc. R. Co. v. Clarke, 152 U. S., 240.

The court in *Lubrano v. Atlantic Mills*, *supra*, says as a further reason for its conclusion:

"A further consideration in favor of a single action "is the confusion of damages which would result from "the maintenance of two actions. Although they "might be theoretically separate, a practical separation "would be quite impossible. The measure of pain and "suffering, or estimated damage to one's estate cannot "be so definitely marked as to limit liberality of a sym-"pathetic jury."

It does not seem to us that because a jury may be sympathetic, such a fact should weigh in the legislative mind against giving a party injured by the wrongful act of another the right of action for such injury, nor should the sympathy of a jury for one man's pain and suffering preclude the legislature from giving the right of action to a woman and her children for actual financial losses sustained by them from the same wrongful act that caused such pain and suffering to another. We cannot agree with the learned court that it is impossible to prove separately and distinctly the damages sustained by the deceased from injuries to him, and the damages sustained by the widow and child from the distinct losses occasioned to them by the same negligent act, and the New York supreme court agrees with us.

Littlewood v. The Mayor etc. of N. Y., 89 N. Y., 28.

Finally, in this analysis of authorities, we call attention to the case of *Donahue v. Drexler*, 82 Ky., 157; 56 Am. Reps., 886, in which the effect of a release by the deceased during life, under a statute, for the purposes of the question now discussed, identical with those of Idaho and Washington, has been considered.

One Kentucky statute is as follows:

"Section 1. If the life of any person not in the em-
"ployment of a railroad company shall be lost in this
"commonwealth by reason of the negligence or careless-
"ness of the proprietor or proprietors of any railroad,
"or by the unfitness, or negligence or carelessness of
"their servants or agents, the personal representatives

"of the person whose life is so lost can institute suit "and recover damages in the same manner that the "person himself might have done for any injury where "death did not ensue." (*Tiffany, Death by Wrongful Act*, p. 300.)

From its latter part this section has been construed, in *Louisville & N. R. Co. v. McElwain*, 98 Ky., 700; 34 L. R. A., 788, as a survival statute, keeping alive a right of action within the control of the person injured during life. Kentucky has a further statute, as follows:

"Section 6. The widow and minor child or children, "or either or any of them, of a person killed by care- "less, wanton or malicious use of firearms or by any "weapon popularly known as colts, brass knucks or "slung shots, or other deadly weapons, not in self- "defence, may have an action against the person or per- "sons who committed the killing, and all others aiding "or promoting the killing, or any one or more of them, "for reparation of the injury, and in such action the "jury may give vindictive damages." (*Tiffany, Death by Wrongful Act*, p. 300.)

It will be noted that in the section of the Kentucky statute last quoted no condition is imposed upon the right of the widow or children to bring their action; the right is given absolutely, without restriction directly or by implication, and irrespective of any rights whatever, or the exercise of them, which the person assaulted may have had in the premises. It is identical in these re-

spects with the statutes of Washington and Idaho giving the right to recover for death.

In *Donahue v. Drexler*, *supra*, the party assaulted brought an action to recover for personal injury, and the action was thereafter, by written agreement, settled between the plaintiff and defendant. Subsequently the party assaulted died from his injuries, and, under the above statute, the widow brought *her* action for the injuries done to *her* by the death.

In holding that she could bring her action entirely uninfluenced by the settlement by the party injured of *his* right of action, the court said:

"In this case we find two causes of action with dif-
"ferent purposes and reasons for their existence. The
"suit for assault and battery could not have survived to
"the personal representative, for the statute says it shall
"die with the person injured or injuring. It was a per-
"sonal action purely for bodily injury; not for pain, suf-
"fering and loss of service to his wife and children,
"after the injury and before death, and the compensa-
"tion which he had the right to was extinguished by
"his death or the settlement which he made. But his
"right of action for the bodily injury from the assault
"and battery, is wholly distinct from the action which
"the widow and minor children may have for reparation,
"after injury resulting to them from the death. This
"statute creates a new grievance, a new cause of action
"in which neither the deceased nor his estate had any
"interest, and for which his administrator could not sue.

"It is based upon the wrong to the wife and children by "depriving them of their natural support and protection "which the law gives them in the husband and father.

"The injury is to them and their rights. They have "the exclusive right of action under the statute, and are "entitled personally to the results of any judgment, "that may be recovered."

The case of *Bowes v. Boston*, 155 Mass., 344, 15 L. R. A., 365, also construes a statute, for the purposes of this question, identical with that of Idaho and Washington, and if it be borne in mind that it contains no restrictions or condition upon the right given, the conclusion of this case is the same as that of *Donahue v. Drexler, supra.*

See also:

Doyle v. Fitchburg, 162 Mass., 66; 25 L. R. A., 157.

We note the case of *Southern Bell Tel. & Tel. Co. v. Cassin*, 111 Ga., 577, 50 L. R. A., 694. This case is without weight as authority in this court. It is in square conflict with the ruling of this court *(Chesapeake & Ohio R. Co. v. Dixon, supra)* and the mass of authority heretofore considered. It holds that the widow, children or heirs do not have an independent, separate and distinct right of action for the losses to them caused by the death from negligence. On this point also the decision is equally in conflict with a prior decision of the same court, namely, in *Western & A. R.*

Co. v. Bass, 104 Georgia, 392. In the Cassin case the court holds the Georgia statute to be a survival statute, and rests its conclusion that a release by the deceased bars the widow and heirs, on the authority of the many cases, heretofore considered by us, which hold such a release to constitute such a bar; but in all of those cases is to be found the peculiar language in Lord Campbell's act creating, not the survival of the right of action had by the deceased, but a *condition*, only upon which the widow and heirs might prosecute their own independent right of action for their loss. This language is not found in the Georgia statute and, hence, those cases are not authority for the holding of the Georgia court that a release, as a general rule of law, bars the widow and heirs. This is true of the case of *Legg v. Britton*, 64 Vt., 652, which the Georgia court says construes "a statute admittedly like our own." The statute of Vermont is not like that of Georgia, because it contains the peculiar language of Lord Campbell's act creating a condition upon which must be exercised the right of action given to the widow and heirs, and it is on that language that the Vermont court bases its conclusion, for it says: "*The language used* clearly gives the same "right of recovery which would have existed in the "intestate if death had not ensued, and as clearly holds "the wrong doer liable the same as he would have been "if death had not ensued."

The Georgia statute has peculiar language of its own, not found in the Idaho and Washington statutes, which

tends to turn the Georgia statute from a death statute into a survival statute. "In the event of a recovery by "the widow, she shall hold the amount recovered sub- "ject to the law of descents just as if it had been per- "sonal property descending to the widow and children "from the deceased." The Georgia statute does not permit the recovery by the widow or children of *their* actual losses, but provides for the recovery of the "full value of the life."

Further, it is submitted that the reasoning of this case is an argument *ab inconvenienti*, and where that is not resorted to, rests on the Biblical theory of the unity of man and wife, and entirely overlooks the modern legal emancipation of the woman. Finally, the actual language of the statute itself is nowhere discussed in the opinion.

The case of *L. & N. Co. v. McIlwain*, 98 Ky., 700, is cited in the Cassin case as upholding the conclusion reached there, but it aids not at all in construing the statute of Idaho or of Washington. The statute of Kentucky there construed is a survival statute. The personal representative "may institute suit and recover "damages in the same manner that the person himself "might have done for any injury where death did not "ensue"; the proceeds, under the statute, go to the estate.

It has been urged by petitioner that the fact that the action *may* be brought by the "personal representatives" under the statutes of Idaho and Washington, shows *by implication* that the action can only be main-

tained where the deceased could have recovered at the time of his death. In other words, that a statute without the peculiar language of Lord Campbell's act means exactly the same as a statute containing that peculiar language! In other words again, that that language means nothing! We have seen that if the personal representatives bring the action, yet there is an entire absence of any connection between them and any right which the deceased had or could have enjoyed; that no right passes from the deceased to them; that they are merely the agents or trustees of the widow and children for the purpose of bringing the action (*Needham v. Railroad Co.*, 38 Vt., 294); that they bring it in the right of the widow and children, and not in the right of the deceased or his estate; that the proceeds belong to the widow and children and not to the estate; that the action is for injury to the widow and children and not to the deceased; that the *object* of the statute is to compensate *them* for *their* injury; that the injury to them from the negligence remains the same even though the deceased incapacitated himself from suing for *his* injury; that the effect given these words by petitioner is purely arbitrary, and that, as the deceased had no interest in the action whatever, there is no rational implication possible. (*Munroe v. Dredging etc. Co.*, 84 Cal., 515; *Noble v. Seattle*, 19 Wash., 133, and the many authorities heretofore cited.)

The provision relative to "personal representatives" is clearly inserted for the convenience and assistance of the widow, and children, who, by force of the very injury

done them, viz.: the removal of the husband and father, are in need of some one to act for them, and by reason as well as authority it cannot be construed *by implication*, in a remedial statute, so as to destroy the independence of the right of action which rests alone on the independent and separate loss to the widow and children.

Needham v. Grand Trunk Ry. Co., 38 Vt., 292.
Bowes v. Boston, 155 Mass., 344; 15 L. R. A., 365.
Doyle v. Fitchburg, 162 Mass., 66; 25 L. R. A., 157.
Davis v. St. Louis I. M. & S. R. Co. (Ark.), 7 L. R. A., 283.

It is further asserted by the petitioner that the courts below, in ruling that the contract made by the deceased does not bind the plaintiffs, are in conflict with the ruling of the supreme court of the state of Washington in the case of *Muldoon v. Seattle City Railway*, 7 Wash., 528, 10 Wash., 311. A glance at that case, however, immediately discloses the entire absence of any possible conflict between it and the ruling of the courts below in the case at bar. In that case the party who had made the contract with the carrier was not killed, but himself brought the action against the company for the personal injuries inflicted. The question, therefore, of the effect of such agreement where death had been caused and suit instituted by the heirs for their own loss, could not have been, and was not touched upon in that case. Furthermore, inasmuch as the party injured brought

the suit himself, the question whether such an agreement also exempted the carrier from liability for death could not have been, and was not raised or decided. Hence, that case has no bearing whatever on the question here.

(2) INTERPRETATION OF CONTRACT.

The contract offered in evidence and pleaded, only purports to exempt the petitioner from liability for "injury to the person," but it is contended by petitioner that it exempts the corporation from liability for *death* also. The contract follows:

"This ticket is not transferable, and if presented by "any other person than the individual named thereon, "or if any alteration, addition or erasure is made upon "it, is forfeited, and the conductor will take it up and "collect full fare. The person accepting this free ticket "agrees that the Northern Pacific Railway Company "shall not be liable under any circumstances, whether "of negligence by agents or otherwise, for any injury "to the person, or for any loss or damage to the property "of the passenger using the same. I accept the above "conditions. Jay H. Adams.

"This pass will not be honored unless signed in ink by the person for whom issued." (Trans., orig. pp. 64, 784.)

This written contract does not expressly release the carrier from liability for *death* of the passenger. The word death is not used in it, nor is any word which means death, nor is any word used signifying a condition

from which death necessarily follows, or usually follows, or even so frequently follows as that there is any natural or rational implication of death from it. On the contrary, the expression "injury to the person," in its ordinary use, conveys the idea of a condition coexistent with life. In the ordinary use of the expression it implies life instead of death. If one were killed by violence, common usage would not describe the passenger's condition as that of "injury to the person," but as that of *death*, or that he was killed. If not *immediately* killed, common usage would say he had received "injury to his person," but would not stop there, for that would not express the actual condition, but would further say *and* from such injury he died. The condition of death would thus be entirely additional to "injury to the person" within the common acceptance of the meaning of these terms. Any one *intending* by the ordinary use of language to release another from liability for killing him would, therefore, not stop short of expressing the exact condition intended. Certainly, if in any situation in life exact expression is called for, it is where one man is authorizing another in effect to take his life with impunity.

But the law has clearly defined the scope and meaning of these expressions, "injury to the person" and "death." In the law there is the same radical difference that exists in the natural meaning of the two expressions.

In the many cases where statutes have been passed providing for the survival of rights of action for "injury

to the person," no court or legislature has ever held that this expression included and meant "death" *also*, but, on the contrary, to permit an action for death, invariably, notwithstanding a right of action already existed for "injury to the person," an additional act had to be passed providing a right of action for death as for an additional, distinct and different injury; and a right of action for "death" has been steadily held not to include a right of action for "injury to the person." Out of this independence of meaning in the two expressions grow the two statutes which obtain in many states, viz., "survival statutes" and "death statutes." All of the cases under the preceding heading are authority as to the legal meaning of these two expressions, to which we call attention. Out of them the following will very well illustrate the proposition.

Hulbert v. City of Topeka, 34 Fed., 510.
Missouri P. Ry. Co. v. Bennett's Est., 47 Pac. Rep., 183.
Needham v. Grand Trunk Ry. Co., 38 Vt., 292.
Bowes v. Boston, 155 Mass., 344; 15 L. R. A., 157.

The question now discussed is that of the interpretation of a written contract purely, nothing more. And the ordinary rule applies that the intention is to be gotten from the language used. The meaning given the language by common usage, by natural interpretation and by legal interpretation, excludes a release of liability for death. Now where is the equity or extraneous circumstance which will warrant the court in

doing violence to the language and in interpolating into the contract an additional term? When the corporation wrongfully injures a person and he thereafter dies therefrom and the law causes a right of action to survive for "injury to his person," the court allows no extraneous circumstances to weigh in favor of those who own this right of action, even though it be the widow and children, and they be destitute, and even though the death be caused by wanton and reckless disregard of ordinary care. The expression in the law, "injury to the person," is kept within its normal meaning so as to exclude a recovery for the death. As contrasted with the widow's unavailing equity, we have the corporation pleading for the right to be free from liability for wrongfully killing a human being and for wrongfully causing the destitution of the widow. The corporation could not even say that it would receive nothing under the contract if it were not released from liability for "death" in addition to "injury to the person," because, if the contract has any validity, the corporation received in return for transporting the deceased from Hope, Idaho, to Spokane, Washington, immunity from liability for "injury to the person," and the deceased, in consideration of his transportation, relinquished his own right to sue if he survived, and under a survival statute, relinquished the right of his estate to sue for injury to his person if he died. A good consideration is some detriment to the promissee or some benefit to the promissor. This, as a consideration for the contract of carriage, was both. We are content to think that no violence will be done

to the language of this contract in an effort to extend the immunity of a common carrier to negligent killing of passengers carried. Such contracts must be strictly construed.

Hinkle v. Southern Ry. Co. (N. C.), 78 Am. St. Reps., 685.

If it be competent at all for the carrier to stipulate for exemption from liability for his negligence or that of his servants, "it should be required to be done, at "least, in terms that would leave no doubt as to the "meaning of the parties."

Compania De Navigacion La Flecha v. Brauer, 168 U. S., 119, 120.

In view of the fact that the deceased had no interest whatever in the loss that resulted from the death, that it was the exclusive injury, under the statute, of the widow and children, and that thus the right of action was exclusively owned by them, the *inference* is inevitable and strong that the deceased in making a contract did not *intend* to deal with or affect rights to which he was a stranger and owned exclusively by others.

In *Clark v. Geer* (C. C. A.), 86 Fed., 448, where the special contract of the deceased with the carrier provided "that in no case shall the liability of the company exceed the sum of $1,000," and the statute (Kansas) permitted a recovery for death for the widow and children of $10,000, the court, referring to the right of action had by the widow and children and construing the contract of the deceased, said:

"It is a right of action which did not exist at common "law, and, *without the clearest evidence of such a purpose*, "we will not presume that the deceased intended to "make a contract that would alter the rights of his "widow and children or next of kin, as defined by the "statute. It is sufficient to say that the agreement upon "which the defendant companies rely to limit the dam- "ages that may be recovered shows, as we think, that the "deceased was contracting solely with reference to a lia- "bility of the carrier to himself, and not with reference "to the statutory liability of the carrier to others, in case "of his death through the wrongful act, neglect, or de- "fault of the carrier."

In construing the contract, if there be some obscurity in its terms, the moral quality of the two constructions contended for is properly to be considered. If the petitioner was merely contending for the right under the contract to destroy goods with entire impunity, this rule, purely as one of interpretation, might not be applicable. There is nothing immoral *per se*, or *contra bonos mores*, in the destruction of goods by a common carrier, but it is essentially unreasonable and wrong for one person to take the life of another. Though the killing be done by negligence, it does not relieve the act of its essentially evil quality, and nations have recognized this by making negligent killing indictable and punishable. Hence the rule is clearly applicable here, that where there are two interpretations of a contract possible, one of which leads to essentially evil results, and the other is more

consonant with reason and justice, the latter will be adopted.

Coughlan v. Stetson, 19 Fed., 727.
Woodward v. Payne, 16 Cal., 445.
Noonan v. Bradley, 9 Wall., 394.

Since it is not *expressed* in the contract that it released the carrier from liability for *death* from its negligence, if such release is in the contract, it must be found there by *implication* from what *is* expressed. Such implication certainly broadens the exemption of the carrier from liability for its negligence beyond what its exemption would be without such implication. It is true that the liability for negligent killing is statutory, but we do not think the rule upon the carrier derivable from the common law is changed thereby. We think the principle announced by this court in the *New Jersey Steam Nav. Co. v. The Merchants Bank*, 6 How., 383, is applicable:

"The burden of proof lies on the carrier, and nothing "short of an *express* stipulation by parol or in writing "should be permitted to discharge him from duties which "the law has annexed to his employment. The exemp- "tion from these duties should not depend upon impli- "cation or inference, founded on doubtful and conflict- "ing evidence; but should be specific and certain, leav- "ing no room for controversy between the parties."

Mich. Cent. R. R. Co. v. Min. Springs Mfg. Co., 16 Wall., 318.

CONTRACT AS EVIDENCE OF DEGREE OF CARE DUE.

But if the contract could be held to extend to death, nevertheless the ticket and contract as evidence to show the status of the deceased or the degree of care to which he was entitled, that he "assumed the risks," were clearly irrelevant and immaterial. (Trans., orig. pp. 784, 785.)

If the ticket showed that he was carried free, nevertheless the deceased was a passenger and entitled to the same degree of care as other passengers and as if he had paid his fare.

Phila. & R. R. R. Co. v. Derby, 14 How., 485.
Steamship New World v. King, 16 How., 469.
Waterbury v. N. Y. C. & H. R. R. Co., 17 Fed. 67.

This is the duty of a common carrier to one voluntarily and gratuitously carried, and the contract on the back of the pass does not purport to change this duty, but recognizes it and provides that if the carrier violates *this* duty and the deceased suffers injury through such violation of this duty, the damages to which the deceased would be entitled through the failure of the carrier to give him the rightful degree of care need not be paid—"The com-"pany shall not be liable under any circumstances "whether of negligence" etc., that is neglecting its duty.

There is no word in the contract that declares the carrier owes no duty, or that a failure to perform its usual duty or to give the usual care will not be negligence. On the contrary, the contract itself expressly

fixes the status of the party using the ticket as that of a "passenger," and expressly states that, when the carrier has become guilty of "negligence," then it shall not be liable for the injury from such "negligence." The contract contemplates the failure of the carrier to perform a *duty* after it has gone into effect, and contemplates the carrier becoming guilty of *negligence* after it has gone into effect, and notwithstanding the making of the contract. If the "injury" to the "passenger" from such "negligence" were not wrongful it was not necessary for the contract to state that the carrier should not be liable for it. A release from liability for injury resulting from negligence, given *after* the occurrence, would not make the act otherwise than negligent, nor the injury otherwise than a wrong. A release from liability for the wrong *when it shall happen*, clearly has no different effect. It is the consequences of a wrongful act that are being guarded against. Petitioner has heretofore admitted that *some* care is owing notwithstanding the contract; it says it is only the *highest* degree of care which the contract provides the carrier need not give, but petitioner fails utterly to show us how this apportionment of care is to be made. If releasing from liability for the injury consequent on negligence relieves from the duty to take the *high* degree of care, it relieves equally from the duty to take any care whatever; there is no restriction or stopping place indicated in the contract. If the liability for the consequences of its "negligence" be the factor in the contract by which the degree or amount of care owing is to be determined,

then *no* liability would logically indicate *no* care whatever; *some* liability *some* care. If there was *no* care due there could not be the "negligence," which is so clearly recognized and anticipated in the contract.

The petitioner further asserts that deceased was not a *passenger* as the reason why he was not entitled to the *highest* degree of care, and yet the contract itself and both parties to it have fixed his status and relation to the carrier, and declare he *was* a passenger, and the negligence which the contract anticipated the petitioner may become guilty of, is clearly, on the face of the contract, negligence in relation to deceased *as such passenger*.

This contract, further, does not state that the deceased "assumed the risks of traveling," or any of them, and the law of fellow servant is clearly inadmissible here. This contract is in marked contrast with the Voigt contract, where an assumption of the risks is expressly provided for. (176 U. S., 498.) It is further in contrast with the contract in the Voigt case in this, that it *is* provided in the latter that it shall cover death.

(3) THE CONTRACT IS VOID AS AGAINST PUBLIC POLICY.

The contract is void as against public policy. The supreme court of the state of Washington, in *Muldoon v. Seattle & City Ry. Co.*, 7 Wash., 528, 10 Wash., 311, has held that a contract by a party carried free, exempting the carrier from liability "for injury to the person" from negligence, is not void as against public policy or otherwise.

But that case does not decide the question now discussed. It was a suit by the party who signed the contract, for the injury to his person. The contract did not purport to release from liability for negligent killing; death was not in the case, and the validity of such a release, therefore, was not considered or decided.

The liability, however, of a carrier of passengers for negligence is not a question of local or state law, and the ruling of the supreme court of Washington does not control. The question is one of general law, upon which the federal courts will reach a conclusion, independent of the ruling of any state court or courts.

New York Cent. R. Co. v. Lockwood, 17 Wall., 357.
Balt. & Ohio R. Co. v. Baugh, 149 U. S., 370.
Chicago M. & St. P. R. Co. v. Solan, 169 U. S., 136.

The contract offered in evidence (Trans., orig. p. 784) only purports to exempt the corporation from liability for "injury to the person," but it is urged that it exempts the corporation from liability for death also, so that, to consider the question raised understandingly, the contract must be read thus:

"The person accepting this free ticket agrees that "the Northern Pacific Railway Company shall not be "liable under any circumstances, whether of negligence "by agents or otherwise, for * * * killing * * * "the passenger using the same."

In order to determine whether the law, an enlightened public policy, will countenance a contract which tends

to take away the safeguards surrounding the life of a citizen, and will thus enable a corporation to take human life with impunity, there are two interests to be considered.

A man's life is not all his own, nor is he privileged to deal with it exclusively as it pleases him. The state or public has an interest in every citizen's life, which interest is even superior to his own interest, and with that interest the citizen may not deal by contract or otherwise.

In the case at bar a citizen was wrongfully killed. Temerity will not go to the length of saying that he was rightfully killed. By no code of morals, nor by any law, divine or human, can it be said that the corporation was right in killing him. An expressed permission from the deceased to the corporation to kill him by negligence could not have changed the character of the killing. The release from liability necessarily implies a wrongful act; otherwise there would be no liability, and no occasion for the release. The release does not change or purport to change the character of the act. The killing was wrongful.

"This natural life being, as was before observed, the "immediate donation of the great Creator, cannot legally "be disposed of or destroyed by any individual, neither "by the person himself, nor by any other of his fellow "creatures, merely upon their own authority."

Chase's Blackstone's Com. (2d ed.), 72.

Any contract which aids or tends to bring about this condition is essentially evil, and is itself counter to a sound public policy.

Any wrongful act tending to take human life is *malum in se*, and to let it go unchecked or unpunished is to lower the sanctity of human life and the moral tone of the people. No one can view the fact that a life under any circumstances may be wrongfully taken without liability, or punishment, or correction from the law, without having the sanctity of human life lowered in his mind.

Scant regard for human life has ever been a feature of low orders of civilization, and has also characterized most markedly the swift decay of states once commanding among nations. Our civilization has ever heretofore been characterized by the extremest protection of human life.

"Whilst the great commercial and business interests "of the country demand their protection, still the lives "and personal safety of persons are paramount. All "other considerations must yield to this the first and "greatest and most important of all rights for which "governments are organized and laws enacted."

I. C. R. R. Co. v. Hammer, 72 Ill., 350.

This paramount consideration given by the state, and hence by the law, to human life is due, first to a proper reverence for the greatest work of God, and second, to the material interest of the state in the life of the citizen.

Kill the citizen and the plow rusts in the furrow; kill

the citizen and the hum of the factory wheels ceases; kill the citizen and the blast is heard no more in the mine; kill the citizen and learning and intellectual progress come to an end; kill the citizen and the taxes cease to be paid, and the machinery of the state comes to a standstill; kill the citizen and the guns of defense are silent, and the land is open to the invader and to subjugation. The citizen is the state.

Both common and written law have ever recognized this interest had by the state in the lives of its citizens, and in all ways provided safeguards for human life and sought to check, by all means possible, any act or condition tending to take human life or remove any safeguard which tended to make it more secure.

"All laws punishing crimes against the person and "against the public health show that the life and health "of the citizen is a matter of public interest and of the "greatest public consideration. That its citizens consti- "tute the strength and wealth of a state is an element- "ary principle of political economy. It certainly can- "not be said that a man has either a moral or legal "right to speculate with his own life; or to make any "contract tending to remove the safeguards which the "law places around it."

Wells v. N. Y. Central Rd. Co., 24 N. Y., 194 (dissenting opinion).

One cannot bind himself by consenting to relinquish the safeguards with which the law surrounds his life.

Cancemi v. The People, 18 N. Y., 129.

"The state, the public, have an interest in the preservation of the liberties and the lives of the citizens, "and will not allow them to be taken away 'without "due process of law.'" *(Ibid.)*

This case was cited with approval by this court in *Home Insurance Co. v. Morse*, 20 Wallace, 445, wherein was held:

"A man may not barter away his life or his freedom, or his substantial rights."

Doyle v. Continental Ins. Co., 94 U. S., 535.
Warnock v. Davis, 104 U. S., 775.

The state protected its interest in human life by making suicide felony at common law. It was considered an offence both against God and the state, and, to deter further loss to the state from such source, the penalties inflicted were most severe, both upon the dead and upon his estate.

Chase's Blackstone's Com. (2d ed.), 937.

In more modern law the state still protects its interest in human life, and in many of our states statutes are passed with a view to prevent suicide.

Nor was the loss any the less to the state if the death occurred through negligence. Negligent killing was manslaughter at common law and indictable.

Chase's Blackstone's Com. (2d ed.), 940.
1 *East P. C.*, p. 262, § 38.

And in many of our states the state's interest in human life is still safeguarded by making negligent killing manslaughter and imposing penalties therefor.

Keeping these principles in view, let us consider the rules which the state, out of regard for its welfare, and therefore, as a public policy, has imposed on carriers of passengers:

"For the law will, as we have seen, in tenderness to "human life and human limbs, hold the proprietors "liable for the slightest negligence."

Story on Bailments, § 601a.

This obligation does not grow out of contract; the state, the law, public policy, imposes it as a general rule. The state no more in this connection than elsewhere commits the preservation of its interest in the lives of the citizens to private contracts or commercial convenience.

Phila. & Reading R. R. Co. v. Derby, 14 How., 485.

The Steamboat New World v. King, 16 How., 469.

While the books have considered the law of common carriers of goods and common carriers of passengers usually together, it is obvious we think that this case rests on a higher principle than is necessarily involved in the law regulating the carriage of goods. There is nothing immoral *per se* in the destruction of goods by a common carrier, but in all times since the Almighty laid the law upon the world "Thou shalt not

kill," the taking of human life has been a thing evil and pernicious in itself, and to be judged of by rules *sui generis*. To remit the penalty in any case imposed for wrongful killing, on the excuses and reasonings which are relied on to excuse the destruction of goods, drags man from his lofty plane and degrades him to the level of inanimate objects. This subject is above the realm of the law of contracts, and cannot be judged by the rules of commercial convenience.

The E. B. Ward, 16 Fed. Rep., 261.
Cancemi v. The People, 18 N. Y., 128.
Home Ins. Co. v. Morse, 20 Wall., 445.
Doyle v. Continental Ins. Co., 94 U. S., 535.

"The common law has a peculiar regard for human "life; and for this reason exacts a greater degree of "care in respect to it than in relation to any matter of "mere property."

The Cleveland P. & A. R. R. Co. v. Curran, 19 Ohio State, 1; 2 Am. Reps., 365.

The rule governing common carriers and the most important fundamental reason for it are thus stated:

"By the law of this country, as declared by this court, "in the absence of any statute controlling the subject, "any contract by which a common carrier of goods or "passengers undertakes to exempt himself from all re- "sponsibility for loss or damage arising from the negli- "gence of himself or his servants, is void as against pub- "lic policy, as attempting to put off the essential duties

"resting upon every public carrier by virtue of his em-
"ployment, and as tending to defeat the fundamental
"principle on which the law of common carriers was
"established—the securing of the utmost care and dili-
"gence in the performance of their common duties to
"the public."

Chicago M. & St. Paul R. Co. v. Solan, 169 U. S., 135.

"To secure care, diligence and fidelity in discharge of
"his public functions the common law charged the
"common carrier as an insurer; but the rigor of the
"rule has been relaxed so as to allow reasonable limi-
"tation upon responsibility at all events to be imposed
"by contract. We have, however, uniformly held that
"this concession to changed conditions of business can-
"not be extended so far as to permit the carrier to ex-
"empt himself by a contract with the owner of the goods
"from liability for his own negligence."

Inman v. South Carolina R. Co. 129 U. S., 139.

In *N. Y. C. R. Co. v. Lockwood*, 17 Wallace, 357, where human life and human limb were in question, this broad general rule and the reason for it were stringently applied in response to the contention that the carrier, while he could not free himself from liability for his own negligence, might exempt himself from liability for that of his servants. The court says:

"If we advert for a moment to the fundamental prin-
"ciples on which the law of common carriers is founded

"it will be seen that this objection is inadmissible. In "regulating the public establishment of common car- "riers the great object of the law was to secure the "utmost care and diligence in the performance of their "important duties—an object essential to the welfare of "every civilized community. Hence, the common law "rule which charged the common carrier as an insurer. "Why charge him as such? Plainly for the purpose of "raising the most stringent motive for the exercise "of carefulness and fidelity in his trust. In regard to "passengers the highest degree of carefulness and dili- "gence is expressly exacted. * * * * It was for the "reason that the limitations of liability first introduced "by common carriers into their notices and bills of lading "were *just and reasonable* that the court sustained "them. * * * * Conceding, therefore, that special "contracts made by common carriers with their cus- "tomers, limiting their liability, are good and valid so "far as they are just and reasonable; to the extent, for "example, of excusing them for all losses happening by "accident, without any negligence or fraud on their "part; when they asked to go still further and to be "excused for negligence, an excuse so repugnant to the "law of their foundation and to the public good, they "have no longer any plea in justice or reason to sup- "port such a stipulation, but the contrary."

Two of the conclusions reached by the court in the Lockwood case are:

"First.—That the common carrier cannot lawfully "stipulate for exemption from responsibility when such "exemption is not just and reasonable in the eye of the "law.

"Secondly.—That it is not just and reasonable in the "eye of the law for a common carrier to stipulate for "exemption from responsibility for the negligence of "himself or his servants."

The court, having thus laid down general rules, applied them to the facts in the case then being considered:

"Thirdly.—That these rules apply both to carriers of "goods and carriers of passengers for hire with special "force to the latter."

In the *Kensington*, 183 U. S., 268, the rule is again stated thus:

"It is settled in the courts of the United States that "exemptions limiting carriers from responsibility for the "negligence of themselves or their servants are both un-"just and unreasonable, and will be deemed as wanting "in the element of voluntary assent; and, besides, that "such conditions are in conflict with public policy. This "doctrine was announced so long ago and has been so "frequently reiterated that it is elementary."

Now we approach the corner stone, the beginning and the end of the argument in this case in support of this contract.

In the Lockwood case there was a man carried with a ticket, on the back of which was a contract similar to

that in the case at bar, which provided: "That the per-"sons riding free to take charge of the stock, do so at their "own risk of personal injury from whatever cause," etc.

This agreement the court held void as against public policy. But, the petitioner says, in that case the passenger paid for his transportation, and in the case at bar he was carried free. However much ramification of argument may be indulged in, this is the sole and only distinction or difference between the case at bar and the Lockwood case, except that in the latter the passenger was not killed, but remained a virile power in the state. This is the ultimate analysis of the two cases. In the Lockwood case the passenger paid, and the court held that public policy prohibited the carrier from relieving itself from liability for injury to such citizen. How the state could feel that it had a greater interest in the safety of the limbs and life of a citizen who pays for transportation than in the safety of the limbs and life of one who does not pay, but is carried by the corporation, for reasons of its own, free, can not be clearly shown.

It is submitted that this court has already decided the question involved here. It has held in two cases that the *same public policy* which held the carrier to liability in the Lockwood case, holds the carrier equally to the full liability where the passenger is carried free.

In *Phila. & R. R. R. Co. v. Derby*, 14 Howard, 485, the court says:

"When carriers undertake to convey persons by the "powerful but dangerous agency of steam, public policy

"and safety require that they be held to the greatest "possible care and diligence, and whether the consider- "ation for such transportation be pecuniary or other- "wise, the personal safety of the passenger should not "be left to the sport of chance, or the negligence of care- "less agents. Any negligence in such cases may well "deserve the epithet of gross."

In the case of *Steamship New World v. King*, 16 Howard, 469, the court, after quoting the matter just quoted, says:

"We desire to be understood to reaffirm that doctrine "as resting not only on public policy, but on sound "principles of law."

In both of these cases the passenger was carried absolutely free, without consideration of any character whatsoever.

A party cannot relieve himself from a duty imposed by, or waive his objection to an act contrary to, public policy.

Oscanyan v. Arms Co., 103 U. S., 261.
Ray on Contractual Limitations, p. 2.

Public policy prohibited the contract in the Lockwood case. The *same* public policy governs where the passenger is carried free. Free carriage does not alter the public policy. How may the same public policy be violated by a contract in the one case more than in the other? It is submitted that the Lockwood case, the case

of *New World v. King* and the Derby case, taken together, logically and necessarily conclude this question.

In the following cases the exact question at issue here was raised, and it was held that a contract, made with a person carried free, exempting the carrier from liability for injury caused by the carrier's negligence, was void as against public policy:

Vette v. Harmon, 102 Fed. Rep., 17.
Jacobus v. St. Paul & Chi. Ry. Co., 20 Minn., 125; 18 Am. Reps., 360.
R. R. Co. v. Hopkins, 41 Ala., 486; 94 Am. Dec., 607.
Gulf, Col. & S. F. Ry. Co. v. McGown, 65 Tex., 640.
Penn. R. R. Co. v. Butler, 57 Pa. St., 335.
Rose v. Railway Co., 39 Iowa, 246.
R. R. Co. v. Henderson, 51 Pa. St., 315.
Roesner v. Herman, 8 Fed. Rep., 782.
Wharton on Negligence, 589, 592, 641.

Mere injury to the person, a wound, a broken leg, does not necessarily inflict any loss on the state or tend to demoralize the public mind. Recovery occurs and useful citizenship continues. The state *might* fail to show resentment here, but it is inconceivable that the state can assert, under any circumstances, its indifference to the wrongful killing of its citizens, by failing to set hard against it a clear and unyielding public policy.

But, assuming that it is possible that negligence which destroys a citizen's life, robs the state of a part of its power, and robs the widow and children of their main-

tenance, support and education, can be excused,—assuming that the excusing of wrongful killing is not inherently and essentially without and beyond the pale of both justice and reason, where is the reason and justice which can be affirmatively shown to give it support in the case at bar?

The case of *Baltimore & Ohio S. W. R. Y. Co. v. Voigt*, 176 U. S., 498, was urged upon the attention of the courts below as conclusive of the validity of this contract. There is not in that case a single element which gives it any bearing on the case at bar, and it admits of radical distinction. The plaintiff in that case was an express messenger, carried by the railroad to care for express matter, under a contract between the railroad and the express company. While this contract recites that such messenger was carried free, he was in fact carried for hire. The express company paid for his carriage. It was part of the contract, and part of the privileges the express company bought. He was no more carried free because of the recitation in the contract, than was the plaintiff in the Lockwood case, because of the recitation in his contract, or the plaintiff in the case of *Grand Trunk Railway Company v. Stevens*, 95 U. S., 655, because of the recitation in his contract. The carriage of Voigt was on terms identical, so far as concerns a consideration, with those in the Lockwood case and those in the Stevens case. In the Lockwood case, the court says:

"It may be assumed *in limine* that the case was one "of carriage for hire; for though the pass certified that

"the plaintiff was entitled to pass free, yet his passage "was one of the mutual terms of the arrangement for "carrying his cattle."

In the Voigt case, Voigt's "passage was one of the mutual terms of the arrangement for carrying" the express matter. The court did not assume, in reaching its conclusion, that Voigt was carried free, nor state that he was carried free. Hence the effect of the only material difference between the Lockwood and Stevens cases and the case at bar, viz., the effect of free carriage, was not discussed or ruled upon in the Voigt case. A passenger for whose carriage a consideration is paid, under the Lockwood and Stevens cases, cannot be bound by such a contract, and if Voigt was a *passenger*, he was within the rule of those two cases. Hence, it was necessary to make him some other thing than a passenger to avoid that rule, and this the court did, and whether he was carried free or otherwise, did not influence the court in holding that he did not bear the relation of passenger to a common carrier within the rule in the Lockwood case. The court holds that, in effect Voigt was a co-employe with the other employes of the railroad, he holding, in his work and duties and place on the train, substantially that relation to them. The strong analogy between his position and that of a servant injured by the negligence of his fellow-servants, is forcibly depicted, and, upon the theory of the freedom of the master from liability for the injury to one servant by the negligence of co-servants, the railroad was held to have competently

made its contract exempting itself from liability for negligence of its servants. The court's language is very explicit in pointing this analogy, and it lays great stress on language equally clear, of a similar tenor, used in other cases, and particularly in *Bates v. Old Colony R. Co.*, 147 Mass., 255. Leading up to this analogy, the court says:

"His position does not resemble the one in consider-"ation in the Lockwood case and similar cases where "the dispensation from liability for injuries was made "a condition of a transportation which the passenger "had a right to demand and which the railroad com-"panies were under a rightful duty to furnish."

The grounds for this conclusion were, that Voigt was a part of the express company which was in effect being carried, and that the express company was a common carrier, and that it was not the duty and function of a common carrier to carry common carriers, and, hence, in carrying the express company, or its representative on the train acting as the express company, the railroad company was not a common carrier. The court further carefully differentiates Voigt from a passenger, by showing that he was carried not among the passengers, though on a passenger train, but on a car specially constructed for express matter, to handle and care for matter transported, during the period of transportation, doing work similar to that done by employes, and was not carried for the purpose of transporting him from one point to another; in all these particulars bearing a close resem-

blance to an employe, and that thus he was not within the definition of a passenger. These conditions, all absent from the case at bar, most radically distinguish the two. While Voigt, could not compel the carrier to furnish the *kind* of carriage which he enjoyed, the deceased in the case at bar *could* have compelled the furnishing of the kind of carriage *he* enjoyed. Exemption from liability in his case "*was* made a condition of a transpor-"tation which the passenger had a right to demand and "which the railroad companies were under a rightful "duty to furnish." He was carried on a regular passenger train on a passenger car, together with other passengers, having no other object or purpose on the train than to be transported from one point to another on the railroad. He was identical, as regards the transportation he desired and was receiving, with every other passenger on the train. He desired and was receiving the exact character of transportation which the company was organized to supply and which the train was run to furnish, and in carrying him the corporation was performing its usual and customary function, and remained a common carrier.

In the Lockwood case, the court, after saying that a carrier may make a special contract when "he under-"takes to carry *some thing* which it is not *his business* "to carry," says:

"But when a carrier has a regularly established busi-"ness for carrying all or certain articles, and especially "if that carrier be a corporation created for the purpose

"of the carrying trade, and the carriage of the articles "is embraced within the scope of its chartered powers, "it is a common carrier, and a special contract about its "responsibilities does not divest it of the character."

President etc. Bank of Kentucky v. Adams Express Co., 93 U. S., 174.

In the case of *Kinney v. Cent. R. R. Co.*, 32 N. J. L., 407, the court rests its decision upholding the contract upon the very sweeping assumption that, in contracting to carry the plaintiff free, the carrier was not contracting in its character of common carrier. Such reasoning as is indulged in is that the carriage was a "mere benevolence" and therefore not "any part of the business of the carrier." This thought is expressed in another form in *Muldoon v. Seattle City Ry. Co.*, 7 Wash., 528, to-wit, that the carrier was not compellable "to convey him without any compensation whatever." In the Lockwood case the plaintiff could not have compelled the carrier to carry him for less than the regular fare, or upon a freight train at any fare, and the plaintiff in the Stevens case could not have compelled the carrier to carry him on modified terms, yet in both cases the carrier was held liable. A carrier can not relieve himself from his ordinary character by modifying his ordinary terms of carriage.

Woodburn v. Cin. N. O. & S. R. Co. (U. S. C. C.), 42 Am. & Eng. R. R. Cases, 514.

In the Lockwood case, on this point the court said:

"It is argued that a common carrier, by entering into "a special contract with a party for carrying his goods "or person on modified terms, drops his character and "becomes an ordinary bailee for hire, and, therefore, may "make any contract he pleases; that is, he may make "any contract whatever because he is an ordinary "bailee; and he is an ordinary bailee because he has "made the contract. We are unable to see the signifi- "cance of this reasoning. It seems to us more accurate "to say that common carriers are such by virtue of their "occupation, not by virtue of the responsibilities under "which they rest."

And finally in the Voigt case, the court again declares the rule attaching to this character of the common carrier:

"That all attempts of carriers, by general notices or "special contract, to escape from liability for losses to "shippers, or injuries to passengers, resulting from want "of care or faithfulness, cannot be regarded as reason- "able and just, but as contrary to a sound public policy, "and therefore invalid."

The Voigt case is further distinguished from the case at bar by the fact that in it the party who made the contract was not killed but himself brought the suit for the injuries to his person, while in the case at bar the party who made the contract *was* killed.

There is another reason given in the books for prohibiting contracts of exemption, viz., the protection of shippers from duress and consequent unfair bargains through the superior position and vantage had by power-

ful corporations with a monopoly of the carrying facilities. In the Voigt case this reason is stated separate and distinct from the sound public policy which rests, as we have seen, on "the fundamental principle on which the "law of common carriers was established—the securing "of the utmost care and diligence in the performance "of their common duties to the public."

This is particularly true in regard to carriers of passengers. Life and limb are dearer to the state than entire freedom of the citizens from hard bargains.

In the Lockwood case, after laying down the "*funda-*"*mental* principles on which the law of common carriers "is founded," viz., "to secure the utmost care and diligence in the performance of their important duties," and "in regard to passengers the highest degree of carefulness and diligence is expressly exacted," the court discusses the inequality existing between the carrier and the public, and, in regard to it, says:

"These circumstances furnish an *additional* argu-"ment, if any were needed, to show that the conditions "imposed by common carriers ought not to be adverse "(to say the least) to the dictates of *public policy* and "*morality*."

And, finally, on this point, there were no possible circumstances of duress in the case of *Grand Trunk Ry. v. Stevens*, 95 U. S., 655. There the passenger had full freedom to pay ordinary fare and ride on an ordinary ticket. He elected not to do so, but his contract of exemption was held void nevertheless.

It is urged that the party injured by the negligence, himself consented to the exemption by the carrier, and that to prohibit the contract between them is a harsh and improper restriction upon the freedom of the parties to contract, which the law should foster and encourage rather than restrict.

The party injured consented to the exemption from liability also in the Lockwood case, and if the right to contract cannot be infringed, it would have been a good defence also in the Lockwood case, and in every other case where contracts have been held void as against public policy.

In *Grand Trunk Ry. Co. v. Stevens*, 95 U. S., 655, the court, having held that there was a consideration for the pass in that case, used the following most significant language:

"We do not mean to imply, however, that we should "have come to a different conclusion, had the plaintiff "been a free passenger instead of a passenger for hire. "We are aware that respectable tribunals have asserted "the right to stipulate for exemption in such a case; "and it is often asked, with apparent confidence, may "not men make their own contracts, or, in other words "'may not a man do what he will with his own?' The "question at first sight seems a simple one. But there "is a question lying behind that: Can a man call that "absolutely his own, which he holds as a great public "trust, by the public grant, and for the public use; as "well as his own profit? The business of the common

"carrier, in this country at least, is emphatically a "branch of the public service."

This question has been answered in many cases, additional to the Lockwood case, imposing restraint on the right to contract.

Home Ins. Co. v. Morse, 20 Wall., 445.
Oscanyan v. W. R. Arms Co., 103 U. S., 261.
Warnock v. Davis, 104 U. S., 775.
Doyle v. Continental Ins. Co., 94 U. S., 535.
Cancemi v. The People, 18 New York, 128.
Munn v. People of Illinois, 94 U. S., 113.
United States v. Joint Traffic Ass'n, 171 U. S., 505.

It is urged in the New York cases (*Wells v. New York Central R. Co.*, 24 N. Y., 181) and in several cases in other states, that:

"It cannot reasonably be said that because five or ten "persons on a train that carries two hundred have such "passes, there is the less inducement to care on the "part of the company or its agents, or that a feeling of "indifference to human life would be thereby caused, "the quantum of interest, the ratio of motive is too "utterly insignificant when compared with the liability "not protected by any contract binding the company "and its agents to every measure of caution."

But the whole "two hundred," everyone on the train, might hold such pass, as was substantially the fact in *Rose v. Des Moines Val. Ry. Co.*, 39 Iowa, 246, the train carrying excursionists, a soldiers' reunion, all the excursionists being supplied with such passes. If all the

train could not enforce the liability, it would certainly tend to make the officials take chances with the train, use old or defective rolling stock, being crowded by such an unusual demand upon their resources, or otherwise suit the convenience of the road as their prime object, instead of exclusively consulting the safety of the passengers. The absence of the stimulating effect of the general rule would, in such case, tend to remove the safeguards about the lives of several hundred citizens, put them in jeopardy, and might tend to the destruction and maiming of many.

Never ceasing vigilance by the carrier is the only security for the passenger. It is, therefore, public policy and the interest of the state to insure this by the only means possible, namely, sharp punishment in the way of liability in case of default. The public at large are entitled, for their safety, to have the liability always unimpaired, to the end that no negligence may go unpunished, and that each punishment may freshen in the carrier the sense of liability and quicken his care and diligence. It might well be that a condition of flagrant negligence existed in the operation of a train and that, through that negligence, one person should be injured or killed, and he be carried free on a contract exempting the carrier. If the carrier be exempted from liability for this negligence and the state's regard is only for the lives and safety of those who pay, these favored ones might also fall victims to this exemption from liability. In such a case the carrier might not consider the condition which caused the death negligence, or,

escaping with impunity, after killing one man, he might not deem it necessary to make a correction, for impunity begets carelessness, and the negligent condition might continue until, because of it, on a subsequent occasion, paying passengers, and many, might be maimed and destroyed; while, if punishment in the shape of liability and heavy damages had followed quick upon the discovery of the negligence in operation in the first instance, the carrier would have been instructed to the effect that the condition *was* negligence, or that he would suffer loss again through its continuance, and would have made a correction of it.

The duty owing by the carrier is a public duty; it does not grow out of private contract with each individual carried, but is imposed for the welfare of the public.

> *Grand Trunk Ry. v. Stevens*, 95 U. S., 655.
> *Chicago M. & St. P. R. Co. v. Solan*, 169 U. S., 135.
> *Munn v. People of Illinois*, 94 U. S., 113.

The imposition of a duty would be a farce were there no penalty to enforce its performance. Hence one of the chief purposes of the infliction of damages in each case of default is to secure the public welfare by enforcing the performance by the carrier of its public duty to take care.

While holding the contract illegal might not *per se* tend to reduce negligence and injury, the infliction of the penalty in the way of damages in each particular case undoubtedly would so tend, and undoubtedly has

had great influence on the present condition of travel. Each punishment quickens and keeps fresh the fear of loss, and, consequently, keeps active the care.

That the state is interested directly even where a single individual is negligently killed, though he ride free, and has exempted the carrier from liability, is further manifest in this: that when the bread winner is taken away, those are left who are usually incapable of self-maintenance, the widow and children, or the aged parents. The duty immediately devolves upon the state to care for them, in the event that they are left without resources. It is the state's interest, therefore, both in order to protect itself from financial burdens, and also to preserve in its citizens a free spirit, that the rightful independence of this little community should be preserved.

In the *E. B. Ward*, 16 Fed., 259, the learned court, in discussing the reason why, at the common law, there was no action for death, says:

"But I think while the ground for the determination "was in part both these, the principal ground was that "the life of a subject was, so far as it could be capable of "proprietorship, the property of the government; that the "justice which was to be satisfied, was, therefore, public "justice; that the deceased person and his family were "valued by the law only as members of the state; that "the public, through the government, inflicted punish-"ment and received the amercement, and, so far as ne-"cessity existed, provided for the family, and, therefore, "private redress or satisfaction was excluded."

The court then speaks of the actions provided by Lord Campbell's act in the various states, and says:

"They permit such an action to be brought only "in favor of those who would naturally be dependent "upon the person slain, and after his death upon the "state, and the effect of the action is pro tanto to relieve "the state of a public charge."

II.

Sufficiency of the Evidence.

(Assignments of Error 17, 18, 23, 24, Trans., orig. pp. 842, 845, 846.)

It was contended in the trial court, in support of petitioner's motion for a new trial (Trans., orig. pp. 76-78), that the evidence in this case was insufficient to support the verdict in two particulars:

First.—That there was not sufficient evidence of negligence on the part of the defendant.

Second.—That there was not sufficient evidence to show that the negligence of the defendant, if any there was, caused the death of the husband and father of the plaintiffs.

The court below, after listening to the extended argument of counsel for the defendant on these points, was in no doubt as to the sufficiency of the evidence in both particulars, and denied the motion. We presume, however, that these points will be urged in this court in support of defendant's request below for a peremptory instruction, and, therefore, we consider them.

NEGLIGENCE OF THE DEFENDANT.

It has been asserted by petitioner that the only negligence charged in the case was high speed and the absence of the vestibule appliance, and that the court erred in allowing the absence of the vestibule to be considered by the jury, and that it can not be known on which ground the jury rested its verdict. There were many elements of negligence shown, as follows:

(a) In a train carrying a diner for use at all times, a car with platforms unclosed at the sides by gates, rods, chains, vestibule appliance, or other device. (Trans., orig. pp. 84-87, 386, 763, 764, 766, 768.)

(b) The placing of this car in the *middle* of the train instead of at either end, thus compelling passengers to pass over the unguarded platforms in using the diner. (Trans., orig. pp. 84-87, 386, 763, 764, 766, 768.)

(c) High speed under these circumstances. *(Infra*, pp.

(d) High speed around a sharp curve. *(Ibid.)*

(e) The failure to use the air brake at the sharp curve. *(Infra*, p.

The absence of the vestibule could not be considered as the negligence in the case, standing separate and alone as an isolated fact, nor was it so presented to the jury. It was presented by the court's charge to the jury in connection with the carrying of the diner, in connection with the placing of the unvestibuled car in the middle of the train,—"under the circumstances"—and

in connection with the absence of "railings, rods, chains or gates to enclose the platforms."

The ultimate question presented to the jury in connection with the car, distinguished from its fellows as the "unvestibuled car," was whether it was negligence to have a car in the train with *open* platforms—"your judgment is appealed to to say whether it was negligence or not upon the part of the defendant company to have that unvestibuled car in that train, *without railings, rods, chains or gates to enclose the platforms.*" (Instructions Nos. 22 and 20, Trans., orig. pp. 808, 807.)

But, in any event, the absence of the vestibule and other devices to close the sides of the platforms was pleaded as an element of negligence (Trans., orig. pp. 16, 17), and the evidence of it was introduced in support of the pleading with the consent of petitioner and without any objection. (Trans., orig. pp. 84, 87, 763, 766, 767, 769, 155-157.)

In the written stipulation putting this matter in evidence, petitioner reserved the right to object at the trial as it should be advised, but evidently considered the matter proper for the jury's consideration in support of the pleading and made no objection to its introduction, and subsequently put the absence of the vestibule in evidence by its own witnesses. (Trans., orig. pp. 763, 766, 767, 769.) At that time the petitioner must have thought this evidence favorable to it, or it would not have made the stipulation and allowed it and the other evidence to go to the jury, if for any reason the evidence be incompetent. Petitioner thus consented that the par-

ticular matter of the unvestibuled platforms should be submitted to the jury. It is entirely too late, when its case has turned out badly, for petitioner to complain of the trial court allowing the jury to consider the evidence which petitioner itself had thus consented might be given them for their consideration, and which petitioner never asked to have withdrawn.

1 *Thompson on Trials*, § 700.
Belk v. Meagher, 104 U. S., 279.
Roberts v. Graham, 6 Wall., 578.
Boston & A. R. Co. v. O'Reilly, 158 U. S., 334.
Patrick v. Graham, 132 U. S., 627.

The peremptory instruction asked by petitioner (Trans., orig. p. 799), on which it must rely, is a general demurrer to the whole evidence, not to any part. There is other evidence of negligence in the record besides the absence of a vestibule device, viz., evidence as to the platforms without *any* device to close them at the sides in connection with the diner carried for use at all times; high speed at the sharp curve; the placing the car with platforms uninclosed in the middle of the train, compelling passengers to pass over them to reach the diner, and the failure of the engineer to use the air-brake to steady the cars at the sharp curve, being charged with knowledge that passengers might be in the act, while accepting the carrier's invitation to the diner, of crossing the open platforms. If in the whole record there is *any* evidence tending to show any act of negligence by petitioner, the verdict cannot be overthrown on the

ground that petitioner let in some evidence to the jury that does not show negligence.

Parks v. Ross, 11 How., 373.

If the petitioner, after admitting the evidence without objection, had desired to prevent the jury from finding negligence solely because of the failure to have the vestibule appliance on the tourist car, it should at least have asked for an instruction separating this particular matter from the absence of rods, gates, chains, etc., the carrying of the diner, etc., and directing the jury that on the failure to have the vestibule appliance, *alone*, they could not find negligence. Such instruction not being requested, the failure to give it was not error.

Carter v. Carusi, 112 U. S., 478.
Express Co. v. Kountze, 8 Wall., 342.
Pennock v. Dialogue, 2 Pet., 15.

DUTY TO ADOPT SAFETY ADDING APPLIANCES.

It had been long the custom of the defendant to carry on its through trains, for the use and convenience of passengers, a dining car where meals were served, and where also cigars and liquors were served to those wishing them. (Trans., orig. pp. 479, 481, 58, par. 4.) This car was advertised as being carried on these trains for the use of passengers. (Trans., orig. pp. 271-273, 280-283.) The conveniences of the dining car were extended to the passengers at all hours, whether at meal-time or otherwise, and whether the train was in motion

or otherwise, sales being made to them at all times except late in the evening when the train crew needed the car for sleep, and the passengers commonly and customarily used this car at all hours, going to and from it without restriction or interference of any kind whatsoever. (Trans., orig. pp. 155, 275, 276, 277, 278, 182, 183, 290, 291.)

The deceased was acting upon the invitation of the defendant, held out to its passengers by prolonged custom and practice, and by its advertisements, and using the dining car for the very purpose for which it was carried, and in the appropriate and long established manner.

At a time when, in the development of railway carriage, there was no dining car carried on the train, and the train stopped at eating stations, and passengers were not invited or expected to pass from car to car, but, on the contrary, were warned to keep off the platforms, the cars then used, the platforms being left open at the sides, were sufficiently safe in connection with the method of travel then in vogue.

When the carrier, however, in keeping up with modern progress, adopted a different or changed method or system of transportation, it became obligatory upon him to make the additional means adopted by him to carry on the changed system or method such that they could be used with safety by the passengers for whose use they were employed. Having adopted the method of feeding the passengers upon the train, and having adopted and put in use a dining car for that purpose, and having

arranged for the passengers in all the other cars to pass to and from it, in order to use it, at all hours whether the train was moving or otherwise, it became the unquestionable duty of the carrier to make such use of it by the passengers safe. It undertook to carry them while in the passenger car, on the platforms going to the dining car, and in the dining car. Its duty was to carry them, *wherever* it undertook to carry them, safely. To put it differently, the carrier, after the adoption of the dining car system, carried its passengers on a train in contradistinction to carrying them, as theretofore, on a car. When passengers were riding, therefore, on the train, in the manner provided for by the carrier, it became the duty of the carrier to make the train safe for the purposes to which he devoted it.

The dining car was carried in front of the Pullman sleeper, behind all the other cars on the train. The tourist sleeping car was immediately in front of it. (Trans., orig. pp. 386, 84-87.) All of the passengers on the cars in front of the diner, were compelled, in reaching it, to pass over one or both of the open platforms of the tourist sleeping car. It is patent to a very low order of understanding that these platforms, over which passengers passed while the train was in motion, to reach the dining car, would be much safer if enclosed at the sides than when open at the sides. There were in known practical use several devices by which the platforms could have been closed at the sides, viz., the vestibuling device, iron gates (Trans., orig. pp. 589, 243-251), chains, rods etc. For adults with normal strength and self-control, the

latter three appliances would have aided greatly to prevent them being thrown from the platforms, though insufficient for the full protection of feeble people, those suddenly sick, or for children. The vestibule appliance gave certain and absolute protection to *all* in crossing the platforms. The vestibuling device makes the train, so far as communication with the outer world is concerned, one car from end to end, and renders impossible falling therefrom. Disputing that very great additional safety lies in the vestibuling device to passengers passing to and from the dining car, is not compatible with reason, and even defendant's witnesses were compelled, by force of persistent cross-examination, to admit it. (Trans., orig. pp. 156, 157, 84-87, 657, 535, 536, 547, 571, 572, 588, 589, 602, 617, 624, 625, 639, 643, 644.)

This vestibuling device had been in known practical use upon railway passenger cars and trains for certainly six or seven years prior to the 13th day of November, 1898 (Trans., orig. pp. 156, 528, 544, 554, 555, 581, 584, 598, 608, 609, 59, par 5), and was in known practical use at that time, and was in use and operation on this very train on all the passenger cars with the exeeption of the tourist sleeping car. (Trans., orig. pp. 84-87.) Its common and established use and steady and continuous adoption, and its patent effect in protecting the passenger in passing from car to car had, at the date of this disaster, long taken it out of the realm of uncertainty and speculation as a safety-adding device to passenger travel.

The railway passenger carrier is bound to use on its

cars the best appliances in known practical use that increase the security of the passengers; and it is bound to adopt the best means or appliances in known practical use which increase the safety of the passenger, in view of the method or system of transportation employed by it—that is, in the case at bar, the appliances giving the most safety in using the dining car.

N. J. R. R. & Trans. Co. v. Pollard, 22 Wall., 341.
Pa. Co. v. Roy, 102 U. S., 451.
Treadwell v. Whittier, 80 Cal., 592-593.
Caldwell v. N. J. Steamboat Co., 47 N. Y., 282.
Meier v. Pa. R. Co., 64 Pa. St., 225.
Hegemen v. West R. Corp., 13 N. Y., 9.

It is not possible to question the application of this rule in the case at bar. The rule might be evaded possibly in other cases by showing that the appliance did not add to the safety of the passenger, or by showing that, by the exercise of the greatest diligence, it was a physical impossibility for the carrier to have adopted the appliance. Neither excuse exists in the case at bar. The additional safety from the appliance is admitted by all. The fact that the deceased would have been alive to-day had it been in operation, cannot be questioned, and Mr. Gilbert, the superintendent of the defendant company at Spokane, himself admitted the additional safety of the vestibule (Trans., orig. p. 657), and his testimony clearly shows that the *convenience* of the defendant was the only reason why it had not been put upon the tourist sleeping cars. (Trans., orig. pp. 653-657.) No excuse

whatever was offered for not enclosing the platforms at the sides with a device of *some* kind. Substantially the only defense on this point attempted was that other roads in the country were guilty of the same negligence. (Trans., orig. pp., 522-644.)

ABSENCE OF ANY GUARD TO SIDES OF PLATFORMS OF TOURIST CAR, AND THE POSITION OF THE CAR IN THE TRAIN.

But, irrespective of this time-honored rule requiring the adoption of safety adding appliances, the action of the defendant in sandwiching the tourist sleeping car, with platforms entirely open at the sides, in the train so as to compel passengers of necessity to pass over its open platforms in going to and from the dining car, is glaring negligence. (Trans., orig. pp. 84-87, 386, 762-771.) All kinds of people used the dining car, children, old people and women. The record shows it was no unusual thing to go around six degree curves at fifty miles an hour. (Trans., orig. pp. 355, 361.) It further shows that when the flanges of the wheels of the car strike the side of the rail at the beginning of a curve there is a jar or jolt, and that the greater the speed the greater the jar or jolt of the car (Trans., orig. pp. 660-663, 105, 118, 119, 131, 426), and the tendency of the human body to swing outward from the train toward the convexity of the curve as the train rounds it is common knowledge.

We have here a narrow bridge from car to car, not stationary, but oscillating, and more or less unsteady

and uncertain to the foot, particularly as cars strike the beginning of curves. If this narrow bridge were stationary over a chasm in the earth, and a fall from it would mean death or serious injury upon the rocks below, to leave it unrailed or unguarded on both sides, all conditions of people having to pass over it, immediately strikes the mind as negligence showing a reckless indifference to human life and limb; but in the case of this unsteady bridge, entirely open at the sides, to which there is communicated from time to time a sudden jar or jolt, by the wheels hitting the curve, and upon which the equilibrium of the passenger is further overthrown outward from the convexity of the curve, any one, railroad man or otherwise, sees, and must see clearly, the likelihood of one passing at such a time falling and being mangled or killed. The lowest order of foresight and diligence for the care and safety of the passenger would foresee and guard against this danger.

The rectifying of this dangerous condition would have been a matter of extreme simplicity, with insignificant expense of time, labor or money. An iron chain, of the value of a few cents, attached to the end of the body of the car and stretched across the side of the platform to the railing at the end of the platform, would have saved this life. A wooden rail, which the average man could make with a jack knife and, with a hinge, two screws, a hook and a screw driver, attach to the end of the body of the car and let down across the side of the platform to the iron rail at the end of the platform, would have saved this life. A farmer sees a broken place in his

fence and knows that his stock may get through into his neighbor's turnips, and knows that he will be guilty of negligence if he allows it to go unrectified, and he takes a piece of fence rail, or old board, and fills the hole. The care and the means resorted to by the farmer to avoid negligence on his part, and to save his neighbor's turnips, if resorted to to fill the hole in the side of this train, would have saved this life. Any of these simple means could have been applied within fifteen minutes at any station at which the train stopped after leaving St. Paul, or could have been applied while the train was in motion.

The record discloses that there are in known practical use, to enclose platforms of passenger cars, light iron gates, open work, and in the nature of things, cheap, which are secured on to the end of the car, and very little expense, and very little time and insignificant labor would have applied these gates to that tourist car, and this life would have been saved. (Trans., orig. pp. 589, 243-251.)

The tourist sleeping car could readily have been carried at the rear of the train, or in front of all the other passenger cars (Trans., orig. pp. 531, 532, 554, 249), and thus the passengers in all the other cars on this train would have been able to pass to the dining car without passing over the open platforms of the tourist car, and if this had been done the deceased would not have been killed. It is true that those in the tourist sleeping car would still have been exposed to danger if they went to the dining car, but comparatively few of

them used the dining car, the tourist sleeping car being fitted with a cooking range, and arranged so that those thus carried can feed themselves in that car (Trans., orig. p. 432); and in any event they would have but one open platform to cross, while with the tourist car in the middle of the train, all passengers in front of it would have to cross two.

In view of these facts, the petitioner's contention that, while having arranged for passengers to pass to and fro over these platforms, and while knowing that they were so passing, it was no negligence on its part not to resort to any of the simple means that would have made the way to and from the dining car safe, is utterly untenable.

Choctaw O. & G. R. Co. v. McDade, ... U. S., ..., decided Nov. 2, 1903.

HIGH AND DANGEROUS SPEED.

The train was three hours and ten minutes late leaving Hope. (Train schedule, Ex. A6, and Trans., orig. p. 312.) The usual or schedule time for this train from Hope to Spokane was two hours and twenty-five minutes. (Train schedule, Ex. A6, Trans., orig. pp. 258-9.) The actual time consumed by it on the afternoon in question was one hour and fifty-five minutes, thirty minutes of the delay being made up in running the eighty-five miles and a fraction between Hope and Spokane. It left Hope at 4.15 P. M. and reached Spokane at 6.10 P. M. (Trans., orig. pp. 312, 323.) The distance between Hope and Sand Point, going west, is sixteen miles. (Trans., orig. p.

301.) The ordinary or schedule time for running this sixteen miles was thirty-five minutes. (Train schedule, Ex. A6.) This distance was run on the afternoon in question in twenty-four minutes (Trans., orig. pp. 321, 322, 516, Train sheet, defendant's Ex. 2), or at an *average* of forty miles an hour from the instant of starting to the instant of stopping. Thus eleven minutes of the thirty minutes made up in the eighty-five mile run were made up in this first sixteen miles. The speed was moderate out through the yards at Hope, and down to the east end of the Pack River trestle, a distance of about four miles. (Trans., orig. pp. 104, 105, 116.) The train went at moderate speed over the trestle, 7,100 feet long (Trans., orig. p. 300), until toward the western end. (Trans., orig. pp. 315, 116, 104, 105.) There is an upgrade about two miles long just west of Oden, a station about midway between Hope and Sand Point. (Trans., orig. pp. 303, 304.) The track from the west end of the Pack River trestle to Oden, which includes the point where the body was found, is substantially a dead level and was in perfect condition. (Trans., orig. pp. 303, 304, 305, 730, 715, 716, 328.) The engine in use was capable of running one hundred miles an hour and had drawn a train at a speed of ninety-three miles an hour. (Trans., orig. pp. 343, 344.) The engineer had, on previous occasions, driven his train over that piece of track and around the very curve where the deceased was thrown off, by his own admission, as many as three hundred times at fifty to fifty-five miles an hour. (Trans., orig. pp. 355, 361, 328.) He had often run

from Hope to Sand Point in less time than on this occasion, and had once driven a passenger train between these points at an average of nearly sixty miles an hour from the instant of starting. (Trans., orig. pp. 347, 348.) The reason attempted to be shown to support his statement that on this particular occasion he was going, at the identical point where deceased was thrown off, at not over thirty-five miles an hour was that this dead level track had curves in it. (Trans. orig. pp. 310, 311, 112.) From the top of the hill beyond Oden he increased his speed rapidly, by his own admission, on a down grade, over track containing curves, from forty-three or forty-five miles on up to sixty between there and Sand Point. (Trans., orig. pp. 340-343, 303, 304, 299-301, map marked defendant's Ex. A3.)

Following these most significant facts, the government railway mail clerk, who had at the time of this disaster been in the government railway mail service for nearly three years, and at the time of the disaster had been running on the through train between Hope and Spokane for about eight months, and who was on the train in question, still in the government service and in the mail car, testified that high speed began about the west end of the Pack River trestle, and that, as the train left the Pack River trestle, it was going at the rate of fifty miles an hour, and that the speed was rapidly increased from that point until by the time it had gone a mile and a half west of the Pack River station the speed had reached sixty miles an hour. (Trans., orig. pp. 117, 118.) And he says further re-

garding the speed over this piece of track from which the deceased was thrown: "I never rode, before nor since, anything like that fast." (Trans., orig. p. 120.) He further states that, from the excessive speed, the car in which he rode so lurched and oscillated at the curves that he was unable to perform his ordinary work, and was compelled to hold on to the car to keep from being thrown from side to side. (Trans., orig. pp. 118-120.) He further says that in the run over this piece of track the car swung so violently that the mail bags piled on either side fell to the floor of the car. (Trans., orig. p. 119.) This witness is a man of long experience on fast trains, holding a position of trust under the government, and we call attention to the whole of his testimony. (Trans., orig. pp. 112-127.)

The witness Wickersham was in the employ of the Northern News Company, selling its goods on the Northern Pacific Railway, running between Helena and Spokane, and was on the train in question. (Trans., orig. p. 127.) Just after the train left Hope he was warned by the brakeman that the train was going to make an unusually fast run from Hope to Spokane, and that it would not be safe for him to go from car to car, and instead of proceeding with his business, on account of this warning, he sat down in the smoking car. (Trans., orig. pp. 128, 129, 139, 140.) That within a mile west of the trestle he served a passenger in the smoking car with fruit, and the shaking of the car going about the curves was so great as to make him sick. He had a long experience in riding on these trains, making ten

trips a month from Helena to Spokane, and had been in the employ of the Northern News Company for over two years. (Trans., orig. pp. 130, 131.) This witness further states that at the time he was serving the passenger in the smoking car, and was made sick, the train was running fifty-five or sixty miles an hour, and that over this piece of track from the trestle west to Oden it was usual, when the trains were late, to run fast in making up time, because the road there was smooth and level, an exceptionally good piece of road (Trans., orig. pp. 132, 133), but that this trip over that part of the road on the 13th day of November, 1898, was the fastest he had ever made there. (Trans., orig. p. 133.) Owing to the speed and the motion of the train over curves, this witness, whose custom it was to go through the train after leaving Hope (Trans., orig. p. 128), did not leave the smoking car between Hope and Sand Point. (Trans., orig. p. 134.)

Mr. Jeannot, a merchant of Hope, Idaho, was on this train in the smoking car, and during the eight years of his residence in Hope had traveled to and from Spokane, over the Northern Pacific road, twice a month. (Trans., orig. pp. 99, 100.) He noticed the increase of speed within half a mile after the train left the west end of the Pack River trestle, and states that within a mile west of the trestle the train was going, in his opinion, sixty miles an hour. (Trans., orig. pp. 104-106.)

Mr. Gabbert, a mining man, who had traveled considerably over the Northern Pacific line, testified that he was thrown against the end of the seat in which he sat by the swinging and lurching of the car, and that the

speed was fast a short time after the deceased left the smoking car to go to the dining car. (Trans., orig. pp. 93-95.)

If the positive testimony of these four disinterested witnesses, as to the high rate of speed at which the train was running and the extreme commotion in the train which this high speed produced along the track between the Pack River trestle and Oden, and at the point where the deceased was thrown from the train, be considered, together with the foregoing additional significant facts, it will be at once seen that the jury had ample evidence upon which to find that the train, at the point where the deceased was thrown off, was running at a very high and unusual rate of speed.

Whether a given rate of speed is negligence depends on the conditions under which it is maintained.

The defendant was running in the middle of its train, a car with open, unguarded platforms, with a standing invitation to the passengers to go over those open platforms at will to the dining car, and was charged with knowledge that at any moment such open platforms might be occupied by passengers passing to such dining car. Instead of moderating its speed over the curves, that the lurching of the car might not throw such passengers from the open platforms, it plunged its train into this crooked track at an unusually high speed, so great that two experienced railroad men, to prevent themselves from being thrown or injured by the lurching of the cars at the curves, refrained from doing their customary work, and the record discloses no warning given to the passengers of the intended high speed.

Very ordinary care, in view of the actual condition of open platforms permitted and suffered by the defendant, and the passing thereover at will by the passengers, and the crooked track, demanded a slow rate of running. To run, under these circumstances, at high speed, such as produced the commotion noticeable in this train was, we submit, most pronounced negligence.

FAILURE TO USE THE AIR BRAKE.

Finally, on the question of negligence, putting on the air brakes, or "touching the air" as it is called, steadies the train going around a curve—makes the hind cars drag on the front of the train and tends to make the train a rigid whole. It takes the slack out of the couplings, puts them on the stretch, and so prevents lateral swaying and oscillation or lurching of individual cars.

The air brake was not put on at that particular curve where the deceased was thrown off, and the jolt or swing of the car he was on at that point was in no way controlled, though the means were at hand for that purpose, and the engineer was charged with knowledge that a passenger might be on the open platform at that spot. (Trans., orig. pp. 351-354.)

A railroad company cannot act in disregard of the actual state of things which it permits or suffers. Its exhibition of care must be increased to meet the demands of such a state of things.

Lynn v. Southern Pacific Co., 103 Cal., 7; 24 L. R. A., 710.

ADVERTISEMENTS.

It would seem that negligence could not be more pronounced or censurable than is shown thus far in this case, but there is still an additional feature of aggravation. This defendant company to get custom and, therefore, to get money out of the traveling public, advertised that its trains, *carrying a dining car*, were solidly vestibuled (Trans., orig. pp. 280-283, 271-273), when it habitually carried a tourist sleeping car in every through train with open platforms, and did not have a vestibuled tourist sleeping car on the road. (Trans., orig. pp. 476, 743, 777.) It is not the moral aspect of the act that is of importance. The passenger was thus told that there was no open platform that he must take care in regard to. He was thrown off his guard. He would proceed through the train without the caution and care which he would naturally use in crossing open platforms, would be stripped of such protection, and would be ambushed by the open platforms under these circumstances. He would be induced to go from car to car, led to the open platform and so induced to cross it, even though when so doing he could *then* see that it was open.

THE SANSOM CASE.

It has been strongly insisted by the petitioner that there is no negligence and no right of recovery in the case at bar, under the ruling in the case of *Sansom v. Southern Ry. Co.*, 111 Fed. Rep., 887, it being contended that the ruling in that case, and of the court below in the case at bar, are in square conflict.

There is no conflict whatever between the Sansom case and the case at bar. In the Sansom case there was no dining car carried in the train constituting a standing inducement and incentive to all the passengers to go from one car to another. There was no standing invitation to all the passengers to use, at all times, another car than that they rode in, and there was an entire absence of the obligation on the carrier (present in the case at bar) to arrange the diner and the train so that the diner might be *safely* used in the manner directed by the carrier and for the purposes for which the carrier invited the passengers to use it. There was no element of negligence whatever shown in the Sansom case except the absence of the vestibule; *all* of the train devoted to through passengers was vestibuled, and there was nothing in the usual and ordinary use of the train, while in motion, because of which passengers would pass over and through the local part and over the unvestibuled platforms; and the unvestibuled car was placed, not in the *middle* of the vestibuled part, but at the extreme end of the train forward. It could not have been reasonably anticipated by the carrier that, while the train was in motion, passengers would be passing over the open platforms. They were not there for that purpose. Therefore it was not negligence to fail to arrange them for safe passage under such circumstances. On the other hand, in the case at bar, it was alleged and shown by the proofs that while carrying a diner, with a standing invitation to the passengers to use it and to pass to and from it at all times, a car was sandwiched

in the *middle* of the train which might have been carried at either extreme end (Trans., orig. pp. 531, 532, 554, 249), being unvestibuled *and* with the sides of its platforms entirely open so as to permit passengers falling therefrom as they passed over the platforms to and from the diner (Trans.. orig. pp. 84, 86, 386, 763, 764, 766, 768), and that, charged with the knowledge that passengers would be acting on the invitation and passing to and from the diner over these unguarded platforms, the petitioner ran its train at an excessive rate of speed around an exceedingly sharp curve. (Trans., org. pp. 104-106, 116-121, 128-134, 94, 95, 189-192, 142, 145, 149, 150, 187, 188, 175-180, 303.) It was further proved in the case at bar that the higher the speed the greater the jolt at the sharp curves (Trans., orig. pp. 660-663), and that, charged with the knowledge that at any sharp curve its invitation was being acted upon by its passengers and that they were passing to and from the diner over the unprotected platforms, while running the train at about sixty miles an hour, the air brake was not applied at the particular sharp curve where the deceased was thrown from the train (Trans., orig. pp. 351, 354). It was further proved that it was customary and proper, at sharp curves, when the train was running at high speed, to apply the air brake, to the end that the jolt or jar at such curve would be moderated and that such was the effect of the air brake when applied under such circumstances. (Trans., orig. pp. 351-354.)

These facts show the sharp and complete distinction between the Sansom case and the case at bar.

RULE OF CARE ON DEFENDANT.

The duty of the defendant, which all of these matters of negligence violated, is as follows: The undertaking and liability of the railway carrier of passengers goes to the extent that the carrier and its agents shall, as far as human care and foresight can go, transport them safely. Such carrier must prevent injuries to passengers in the course of their transportation which may be avoided or guarded against by the exercise, upon the part of the carrier, of extraordinary vigilance and foresight, aided by the highest care. And this caution, foresight and vigilance must necessarily be extended to all the agencies or means employed by the carrier in the transportation of the passenger. For the slightest negligence or fault in this regard the carrier is liable.

Pa. Co. v. Roy, 102 U. S., 451.
Ind. & St. L. R. R. Co. v. Horst, 93 U. S., 291.
Trumbull v. Erickson, 97 Fed., 894.
Phila. & Reading R. Co. v. Derby, 14 How., 485.
Steamboat New World v. King, 16 How., 469.

The rule relative to taking questions of negligence from the jury is thus stated in *Richmond & Dan. R. Co. v. Powers*, 149 U. S., 45:

"It is well settled that where there is uncertainty as "to the existence of either negligence or contributory "negligence the question is not one of law, but of fact, "and to be settled by a jury; and this whether the un- "certainty arises from a conflict in the testimony, or be-

"cause the facts being undisputed, fair minded men will "honestly draw different conclusions from them. "Sioux City & R. R. Co. v. Stout, 84 U. S. 17 Wall. 657; "Washington & G. R. Co. v. McDade, 135, U. S. 554; "Dela. L. & W. R. Co. v. Converse, 139 U. S. 469."

Gardner v. Mich. Cen. R. Co., 150 U. S., 361.

THE CAUSE OF DEATH.

Petitioner's complaint that there was not sufficient evidence to enable the jury to determine how the deceased came to his death seems hypercritical in the extreme.

The rule in one of the cases forced on the attention of the court below on behalf of the defendant in this connection, was thus stated:

"The circumstances themselves must be shown, and "not left to rest in conjecture; and, when shown, it must "appear that the inference sought is the only one which "can fairly and reasonably be drawn from these facts."

Ruppert v. Brooklyn Heights R. Co. (N. Y.), 47 N. E., 971.

It is of very little moment, in determining the sufficiency of evidence in a given case, that other evidence in other cases was held insufficient. It is with the facts shown in the case at bar that we are concerned.

There being no eye witnesses to the death, circumstantial evidence is necessary to prove the manner of it. We state the facts actually shown and not left to

conjecture, from which there is but one fair and reasonable inference to be drawn, viz., that deceased was killed by being thrown from the open platform by the lurching of the train and by falling upon the rocks below.

The theory of suicide is excluded by all the circumstances shown in the record as surrounding the domestic life of the deceased (Trans., orig. pp. 205-234), by his professional standing (Trans., orig. pp. 287, 290, 286, 274), by the circumstances attending the trip to Hope and the return up to the time of his disappearance, and by the presumption of law against suicide.

Standard Life and A. Ins. Co. v. Thornton, 100 Fed., 582.

Had the deceased gone off any other platform than one of the two open ones, he would have left the door open, and no effort was made by the defendant, whose employees had charge and continual supervision of the train, to show any such condition.

Death from assault by another person is excluded as follows: There is no evidence of enmity. There was no robbery; he carried little money and his watch, money and other property was on the body when found (Trans., orig. pp. 210-215, 714). The wounds were not made by pistol, or sharp instrument, were very numerous and in number and character were such as would naturally be made by the body striking several times on the rocks, when thrown from the train. Defendant, who had the control, inspection and cleaning of defendant's cars, did not attempt to show any blood on any of defendant's

cars, which would naturally have been there from the many wounds on deceased had they been inflicted on the train. The law will not presume, for the benefit of defendant, that a crime has been committed on its train. To create such a defense it must prove the fact. The presumption is the other way.

Timson v. Moulton, 3 Cushing, 269.
Hewlett v. Hewlett, 4 Edw. Ch., 7.
Savier v. Chipman, 1 Mich., 116.

The body was in the following condition: The nose was mashed down to the face, the upper lip cut through, and one eye destroyed and collapsed; the skull was broken and a piece sheared off, being contained in a large flap of scalp partly detached from the head; there was fracture of the base of the skull and a wound in the scalp on the back of the head; both bones of the left forearm were broken, the hand bruised and swollen, noticeably on the inside, and there were contusions on the surface of the limbs; there was a wound in the back of the chest to the left of the spinal column, ragged at the edges, which wound communicated with the interior of the chest cavity, and the lungs, heart or large blood vessels within the chest were ruptured. A piece of bone, together with some blood, was found on one of the rocks, showing how the wounds on the head were inflicted. The wound in the back was a three-cornered or triangular ragged wound, with the evidences of being punched by a rough blunt object, the triangular flap being pushed into the wound by the punching object.

The object most accurately fitting this wound would be a broken, rough, pointed triangular piece of rock. There was much broken rock on the ground. The terrific impact with the rocky ground of a body weighing over two hundred pounds, and hurled with the momentum of a heavy train running at fifty to sixty miles an hour, would readily rupture the vital organs in the chest, though there were no external wound in the chest wall. These traumatic conditions caused death. (Trans., orig. pp. 234-243, 265-269.)

Death from natural causes is excluded by the fact that the deceased was in perfect health (Trans., orig. pp. 216, 268), and that immediately before his death he appeared in perfect health (Trans., orig. p. 95). Dr. Penfield testified that the traumatic lesions caused death (Trans., orig. p. 268). The jury, therefore, was not at liberty to guess that deceased died from natural causes.

Now, in addition to the foregoing facts, the jury had the following affirmative facts shown from which to find the manner of the death.

After passing Pack River trestle, and just before reaching the point where the body was found, which was only one mile and 3,480 feet from Pack River trestle (Trans., orig, pp. 191, 292), deceased left the dining car with the cigars for himself and friend going toward his friend and the smoking car (Trans., orig. pp. 480-484). The car next the diner in front was the tourist sleeping car with two open unguarded platforms, over which deceased had to pass to reach his friend and the smoking car. Deceased was never seen on the train or alive

after stepping from the diner toward these open platforms. The train was running over the track opposite where deceased was found, in the neighborhood of sixty miles an hour, and whatever the exact speed, so fast as to make the cars lurch violently at the curves. The greater the speed and the sharper the curve the more violent the shock when the flanges of the wheels hit the sides of the rails and the train deviates from the straight line ("High and dangerous speed," *ante*, pp. 77-83; Trans., orig. pp. 660-663). This is common knowledge. Six degrees of curvature was the highest curvature between Hope and Spokane; the curve where the body was found was a six degree curve, very sharp (Trans., orig. pp. 303, 189, 190, map marked defendant's exhibit "A3"). It is usual when going fast to steady the train at curves and reduce the lurch by setting the air brake; the air brake was not set at this curve and the full force of the lurch remained unbroken and operated on the deceased unchecked (Trans., orig. pp. 351-354).

The body was found 108 feet in a diagonal line from a point on the track where the indications on the ground showed it left the train and 64 feet at a right angle from the convexity of the curve (Trans., orig. pp. 142-151, 175-178, 187-191, plaintiff's exhibit "C2"), showing the tremendous force communicated to deceased on the train and the great speed and lurch necessary to produce it. The tendency of the human body is to swing to the convex side of the curve, when the train strikes the curve (Trans., orig. pp. 657-663). The body was found on the convex side of the curve where it naturally would

be under the working of this rule; and the hat, cuff and other property of deceased was scattered along on the same side of the track. The hat, being lighter than the body, had received less momentum from the train and was, therefore, east of the body and nearer the track (Trans., orig. pp. 144-149, plaintiff's exhibit "B1," 186-196, exhibit "C2," and photograph marked exhibit ....., 709-714, 732, 733). The point on the track where the indications on the ground tended to show deceased left the train, was 125 feet from the beginning of the curve (Trans., orig. pp. 188, 190, plaintiff's exhibit "C 2" 144-146); his hold was therefore broken and he was tossed into space within an instant after the wheels engaged the curve and the shock was communicated to the car. His broken left arm (Trans., orig. p. 240), his left hand bruised on the inside (Trans., orig. pp. 240, 210), the ring which was on the left hand and which was broken and scarred also on the inside (Trans., p. 210, plaintiff's exhibit "R"), and one cuff pulled off, point to an instant of struggle to maintain his hold before his weight and the impetus of the lurch of the train and the swing outward of the body disengaged his hand.

It is urged that deceased had a "sudden fit of illness" or "stubbed his toe." His actual good health and his appearance of it immediately before he was thrown from the train (Trans., orig. p. 95) rebut both conjectures. But, assuming that he became sick, we are not aware that the duty of the carrier to exercise the highest care for the safety of his passengers, extends to them only when in a state of perfect health. A state of sickness

does not necessarily end in death. The presumption is in favor of the continuance of life. Thousands of men have lived useful and long lives after suffering such ills. Nor can a man be charged with contributory negligence, or with "assumption of the risk," through becoming sick, or through stubbing his toe. In the event of either condition a gate or vestibule would have saved deceased from death on the rocks, as probably would have done a chain or bar.

It is submitted that the "inference sought is the only one which can fairly or reasonably be drawn from" the facts shown in this case, viz., that from an open platform, by the lurching of a car at a curve, the deceased was thrown and killed, and that the jury was fully warranted in so finding.

Choctaw O. & G. R. Co. v. McDade, ... U. S., ..., decided Nov. 2, 1903.

Cameron v. Great Northern Ry. Co., 77 N. W. Rep., 1020.

Texas & Pacific R. Co. v. Gentry, 163 U. S., 353.

Felton v. Newport, 105 Fed. Rep., 332.

Home Benefit Ass'n v. Sargent, 142 U. S., 691.

McAfee v. Huidekoper (D. C. app.), 34 L. R. A., 720.

The demand for a peremptory instruction, which raises whatever questions this court can consider relative to the sufficiency of the evidence, is equivalent to a demurrer to the evidence and admits all the facts plaintiff's evidence tended to show, as the high speed, the

violent lurching at the curves, the points on the ground where deceased struck and lay, and the distances, etc.

Parks v. Ross, 11 How., 373.

"The case should not have been withdrawn from the "jury unless the conclusion followed, as a matter of "law, that no recovery could be had upon any view "which could properly be taken of the facts the evidence "tended to establish."

Tex. & Pac. R. Co. v. Cox, 145 U. S., 593.
Dunlap v. Northeastern R. Co., 130 U. S., 649.
Standard & Life Accident Ins. Co. v. Thornton, 100 Fed. Rep. 582.

But it is not within the province of this court to review the evidence in the record, to determine whether or not the inference drawn by the jury from the evidence was a reasonable one, or the only one that might fairly and reasonably be drawn, or to consider the weight of evidence, or to determine whether the jury was warranted in reaching the conclusion that the defendant caused the death of the deceased. The great speed and lurching, the open platform, the deceased being last seen stepping toward it, the sharp curve and the relation of the body to it, was, by itself, certainly *some* evidence tending to show the way the deceased was killed, irrespective of the balance of the evidence on this point.

"It is not for us to decide that the jury brought in a "wrong verdict under a correct charge, if the record

"shows, as it does, that there was *some* evidence to "support the finding which was made."

Chicago & N. Ry. Co. v. Ohle, 117 U. S., 123.
Hepburn v. Dubois, 12 Pet., 375.
Zellers Lessee v. Eckert, 4 How., 289.
U. S. Express Co. v. Ware, 20 Wall., 543.
Barreda v. Silsbee, 21 How., 146.
Gregg v. Moss, 14 Wall., 564.
South Pac. Co. v. Corey, 109 Fed., 416.

The impropriety of this court interfering with the verdict of the jury, is emphasized by the fact that a motion for a new trial was made and argued below, upon the ground of insufficient evidence to support the verdict, and the motion was overruled by the judge who saw and heard the witnesses testify (Trans., orig. pp. 76-80). Appellate courts are quick to refuse to interfere with the verdict under such circumstances.

Miller v. Bean, 13 Wash., 516.
McDougal v. Walling, 13 Wash., 80.

Defendant's Authorities on Cause of Death Distinguished.

It seems proper to notice some of the cases heretofore relied on by petitioner in its discussion of the cause of death.

There is no difficulty in distinguishing the case of *Patton v. Texas & Pacific R. Co.*, 179 U. S., 658, from the case at bar. That suit was between master and serv-

ant, not between passenger and carrier, which fact was markedly emphasized by the court in its opinion. The question discussed in that case was whether the master had been guilty of negligence. The question of negligence is a mixed question of law and fact, and because of this composite character it is always retained to a certain degree within the control of the court. The step was loose, and the question was whether there was any negligence on the part of the master; not whether negligence, which was proven, had produced a given result, but whether there was any negligence. If a *passenger* had been injured by the defective step, there would have arisen a *presumption* of negligence. (*Penn. R. Co. v. MacKinney* (Pa.), 2 L. R. A., 820.) In the case at bar the question is not one of negligence or no negligence. The question is—assuming the negligence to be clearly shown, as by the unguarded platform, the high speed at the curve, the failure to apply the air brake at the curve, the position of the unguarded tourist sleeping car in the middle of the train in connection with the use of the diner—assuming these things to constitute negligence, did that negligence, so shown, cause the death? In other words, was the deceased thrown from the train because of the open platform and the high speed, and the absence of the air brake at the curve, etc.? The question thus presented is one of pure fact, unmixed with any element of law, and is within the rule heretofore stated, that where there is *some* evidence to support the finding of the jury, the court will not interfere. But, even in a

question of negligence, in the case now being distinguished, the court, having said "that jurors are the recognized triers of questions of fact," further says:

"Hence it is seldom that an appellate court reverses "the action of a trial court in declining to give a per- "emptory instruction for a verdict one way or the other. " * * * * He has the same opportunity that jurors "have for seeing the witnesses, for knowing all those " matters in a trial not capable of record, and when in " his deliberate opinion there is no excuse for a verdict "save in favor of one party, and he so rules by instruc- "tions to that effect, an appellate court will pay large "respect to his judgment."

This "deliberate opinion" of the court below, in the case at bar, was exercised not only in refusing a peremptory instruction, but in denying the motion for a new trial. Further, in *Patton v. Texas, etc.*, the court says:

"And where the testimony leaves the matter uncer- "tain and *shows* that any one of half a dozen things "may have brought about the injury, for some of which "the employer is responsible, and for some of which he "is not, it is not for a jury to guess between these half "a dozen causes and find that the negligence of the "employer was the real cause, when there is no satis- "factory foundation in the testimony for that conclu- "sion."

Bailey on Master and Servant, cited by defendant below, says:

"It may be correctly stated as a rule in all cases that "proof of an alleged act or omission as causing injury "is not sufficient as long as other causes *exist* and *were* "*present* which might as well have caused it."

Not only was there nothing shown in the case at bar to be in existence, other than the negligence of the defendant, which might have caused the death of the deceased, but every *surmise and conjecture* which has been indulged in by the defendant to overcome the natural and logical conclusions deducible from the evidence, has been affirmatively rebutted. Suicide has been excluded (*ante*, p. 89). Assault, or the throwing of deceased from the train, by another person, has been affirmatively excluded by the facts (*ante*, pp. 89, 90), but such conjecture and surmise are further rebutted by the presumption against crime.

We have heretofore rebutted the surmise and conjecture that deceased died from natural causes, by showing that he was in perfect health, and appeared so, within a few minutes of his being thrown from the train (*ante*, p. 91), and there is the presumption in favor of the continuance of the existing state of things, to overcome which there was no evidence whatever.

The case of *Admr. of Wintuska v. L. & N. R. Co.*, 20 S. W., 819, is readily distinguishable. It was a suit between master and servant; the master was under no obligation to guard the top of the freight car so that the employee could pass over it without danger of falling off. There was no invitation to pass over *coupled with the obligation to make the passage safe.* A slight jar to

one on the top of a car would be sufficient to cause such a person to lose his balance and fall. It required considerable jar to throw the deceased from the platform, the presumption being that he was following the ordinary course and using ordinary care, and so holding on in crossing, but, if he lost his balance by a slight jar, he was still entitled to be protected in making the passage, by the vestibule, or a chain, or gate, or rail. In the Wintuska case, the evidence proved as a fact that the plaintiff *was so circumstanced* that he *might* have fallen from the top of the car; and, therefore, might *not* have been struck in going down the ladder. The evidence in the case at bar and the presumptions leave no other way for the deceased to have left the train than to have been thrown from the open platform by the motion of the car at the curve; and, while in the Wintuska case the *evidence* about the top of the car and the plaintiff on it was in the case showing an alternative way in which the disaster *might* have been occasioned, the evidence in the case at bar presents no alternative way for the disaster to have happened.

In the case of *Dobbins v. Brown*, 23 N. E., 537, "There was no proof that the follower had not always "operated as it was designed to do, *or of anything that* "*would on this occasion have been likely to impede its* "*natural operation.*" In the case at bar there *was* something shown in regard to the train that "would on this "occasion have been likely to impede its natural oper- "ation," so far as the deceased was concerned, namely the unguarded platform, the high speed at the curve,

the failure to use the air brake at the curve, and the position of the tourist car in the train.

In *Geoghegan v. Atlas S. S. Co.*, 40 N. E., 507, the theory being that deceased fell through an opening in the bulwark from the deck, the court said: "It was "proved that it was part of the duty of the deceased to "wash the silver after dinner and to pass out on deck and "throw overboard the water used for that purpose. No "one saw the deceased fall overboard, *nor did anyone see* "*him go on deck* * * * * There is no direct proof "as to how the deceased met his death. *There is nothing* "*to show that he fell through the open port* or that his "exit from the ship was accidental." While in that case the deceased was not seen to go toward the open port, or even to go on deck, whence falling through it would be possible, and there was *nothing* to show that he fell through the open port, in the case at bar the deceased was seen within three or four feet of the open platform, going toward it, and under such circumstances as to necessarily show that he intended to cross it. The other platforms being vestibuled and the doors closed (Trans., orig. pp. 441-444) and not found open, it was the only means of exit from the train for him. A lurch occurred to the car as the train reached the point opposite where the body was found. There are many other circumstances in the case at bar tending to show that the deceased was thrown from the open platform, while in the case just cited there were no circumstances whatsoever pointing to the way in which the deceased left

the ship, nor were any of the ways which conjecture might give rise to, rebutted.

In *Searles v. Manhattan Ry. Co.*, 5 N. E., 66, the plaintiff on the defendant's car was struck by a cinder. The evidence showed that the cinder might have come equally well either from the smoke stack or the ash pan of a near-by engine. The *evidence* proved that cinders did come from both places. This being the *proof* in the case, the court says: "When the fact is that the damages "claimed in an action were occasioned by one of two "causes, for one of which the defendant is responsible, "and for the other of which it is not responsible, the "plaintiff must fail if his evidence does not show that "the damages were produced by the former cause, and "he must fail also if it is just as probable that they were "caused by the one as by the other. * * * * * "There is no claim that the defendant is liable for this "accident if the cinder came from the smoke stack; but "the claim is that it came from the ash pan because it "was out of repair; but there was *no* evidence that the "ash pan was out of repair or that the cinder came "from it." In the case at bar there was no proof whatever tending to show any condition *in existence*, other than the defendant's negligence, which could have caused the disaster. It is shown that the train *was* out of repair, in that the platform was unguarded, and other acts of negligence tending to the production of the accident are shown in the high speed at the curve, and the failure to set the air brake, and it is clearly shown that it is *not* "just as probable" that the death was caused

by any other condition than the defendant's several acts of negligence.

In *Babcock v. Fitchburg*, 35 N. E., 596, the court says: "There is no evidence that any of the windows or doors "of the building were open or that there was then any "occasion for having them open, or that there was any "crevice or opening through which sparks *could* enter "the building. Persons looking on from a distance "saw the smoke, but no witnesses saw any sparks or "cinders." The court then recites that it was *proven* that powder mills are liable to explosion from the carelessness of men or defective machinery, and that Bennett, one of the employees, had entered the building a few minutes before the explosion, and further recites that the railroad had been operated by the mill for twenty-five years prior to the time of the accident, with the same kind of locomotives, without causing any injury. Under these circumstances the court naturally reached the conclusion that it was not proven what caused the accident; but it says: "If the natural tendency of the "operation of the defendant's railroad was to endanger "this mill by the sparks emitted from its locomotives, "the case would be different." In the case at bar, it is submitted, that "the natural tendency of the operation of defendant's" train around the sharp curve at about sixty miles an hour, with an unguarded platform, without applying the air brake at the curve, without warning to passengers, and with an outstanding invitation, which was generally acted on, for passengers to pass over such open platforms at will and at all times, "was

to endanger" the lives of such passengers, and that such "case would be different" from *Babcock v. Fitchburg*, as the learned court in that case said it would be. The mere fact that, theretofore, these various acts of negligence never happened to concur with the presence of a passenger on the platform, so as to kill such passenger, does not alter the "natural tendency" of such operation of defendant's train.

In *Pennsylvania R. Co. v. MacKinney*, 2 L. R. A., 820, something, probably a piece of coal, hit the passenger in the eye, and there was no evidence whence it came, and much strong evidence rebutting any inference that defendant was responsible for it. Plaintiff stood upon the bare assumption that because he was injured on defendant's train, therefore defendant was liable, and the court below so charged the jury. The supreme court reversed this case, holding that the negligence on the part of the defendant must be proven, and could not be inferred from the mere happening of injury to the plaintiff while on defendant's train. The court says: "Evidence was also introduced to prove that all the "appliances, machinery, etc., of the road, including the "engine, were in good order, and that the latter were "properly provided with spark arresters. There was no "derailment of the train, no collision, no breaking of "any machinery, nor any evidence of anything wrong "with the passing train or cars."

In the case at bar there *was* something wrong with the passing train, and the many acts of negligence on the part of the defendant have been pointed out.

In the case of *Benedict v. Potts*, 41 L. R. A., 478, the plaintiff was on the car when it went in the tunnel, and was not on the car when it came out of the tunnel, and the court says: "There was some evidence tending to "show that a part of the board running down the center "of the tunnel roof had been slabbed off at one point, "but there was nothing to indicate when that had hap- "pened. The car did not leave the track, no part of it "was shown to be out of repair, the track was not de- "fective, and *no* explanation is given in the record as to "what caused the injury."

This involves the same principle as the case just cited. The plaintiff relied on the fact that he was injured on defendant's car to raise a presumption of negligence. In the case at bar the question is not that of negligence, but an unmixed question of fact, the many elements of defendant's negligence being strongly shown, together with the circumstances logically and certainly pointing to its operation upon the deceased, resulting in his death.

In the case of *Providence & Stonington Steamship Co. v. Clare*, 127 U. S., 45, the deceased was seen on the steamer shortly before the collision, through which collision the steamer burned and sank in Long Island sound. He was not seen at the time of the collision, nor was his body found in the neighborhood of the wreck, nor even in the water any where. Two days afterward the body of the deceased was found in the city of Stonington. This is the whole of the evidence in the case tending to show that the deceased, or any person, was killed by the collision and the sinking and the

burning of the steamer. The body was not found at the place of disaster, nor how the deceased got to Stonington in any way accounted for, nor was it proved whether he arrived there living or dead, in good health, or injured, or sick. It was not proved that the body bore evidences of death from drowning, or burning, or any kind of violence. In the case at bar the deceased was seen on the train, within less than two minutes of its reaching the point where his body was found, passing toward the open platform. He never reached the smoking car toward which he was proceeding, and to which the purchase of the two cigars and the reason for his leaving it, and the presence of his overcoat and friend there, all showed he intended at once to return. He was not on the train when it reached Spokane. He was found immediately in the neighborhood of the defendant's track, and at the exact point where the operation of the defendant's negligence, to-wit: the high speed at the curve, the open platform, the failure to use the air brake at the curve, would have naturally placed him. There was no way for him to get to the spot where he was found except by being thrown there from the train, because the train made no stop between Hope and Sand Point. He bore unmistakable evidence of death from violence. These circumstances, with the large amount of additional circumstantial evidence in the case at bar, as contrasted with the meager evidence in the case now being discussed, forcibly distinguish the two.

In *Bond v. Smith*, 21 N. E., 128, the court says: "How did the accident happen? How came he to fall

"over the stone coping into this known place of danger?
"*The evidence does not tell us;* it is an unsolved mystery;
"*no plausible theory can be suggested to account for it.*"

In the case at bar the evidence does tell us, with all the certainty of which circumstantial evidence is capable, how the accident happened. There *is* a very plausible, reasonable and probable theory which "can be suggested to account for it." The case at bar is thus radically distinguished from *Bond v. Smith.*

These are the cases which defendant has heretofore considered its leading cases, and on which it has laid most stress.

Finally, it has been urged that no lurch was proved to have taken place at the particular curve where deceased was thrown off. It was proved that there were successive lurches from the trestle to Sand Point at the curves; that this was the sharpest curve between the two points (Trans., orig. pp. 309, 301); that the train was running about sixty miles an hour; that the oscillation of the train was not moderated at that particular curve by the use of the air brake; that the outer rail was raised so that, *theoretically*, the flanges of the wheels would not strike the rails and create the lurch *going at forty miles an hour*, but *practically* and in fact they *would* strike and create the lurch even at that speed, and that the higher the speed the greater the blow of the flanges of the wheels when the car engaged the curve. (Trans., orig. pp. 659, 661, 662.) We think the court would take judicial notice of a lurch at a sharp curve, at high speed with a heavy train, even if the record had been silent.

"Assumption of the Risk," or Contributory Negligence

(Assignment of Error 30, Trans., orig. p. 851.)

On its assertion that there are only two elements of negligence in the case, viz., high speed and the absence of the vestibule, which assertion we have shown to be erroneous (*ante*, pp. 66-69), petitioner insists that the deceased crossed the platforms knowing that they did not have the vestibule appliance, and that, "so far as the "unvestibuled condition of the platforms is concerned, "the case is a plain one of risk assumed by the de-"ceased." The quotation is from page 20 of petitioner's brief on the application for the writ of certiorari, where it is further said that since the negligence as to the vestibule appliance was overcome or neutralized by the assumption of the risk as to it by the deceased, and it could not be determined whether the jury rested its verdict on the absence of the vestibule appliance or upon the high speed, the judgment must be reversed.

That there is such a doctrine or rule in *the law of common carriers of passengers* as "assumption of the risk," which would constitute a defense to petitioner's negligence, is a proposition of law to be dealt with by the court, and it is urged that, though the facts as to the conduct of the deceased went to the jury and the jury found on the facts that the conduct of deceased did not bar a recovery, this court will declare as a matter of law that "assumption of the risk" shows the judgment to be erroneous.

We have shown that the evidence as to the vestibule went in by the consent of petitioner and without objection. (*Ante*, pp. 67-68.)

The jury was instructed that contributory negligence by deceased would bar the action (Par's 30, 44, 45, 46, 47, Trans., orig. pp. 812, 819-821). No exception was taken to these instructions to the jury to consider the conduct of deceased in relation to contributory negligence, instead of in relation to "assumption of the risk," and no instruction was asked on "assumption of the risk" (Trans., orig. pp. 825-830). To save this point an instruction should have been requested, and, petitioner failing so to do, the point is waived and cannot be raised here.

In *Carter v. Carusi*, 112 U. S., 478, the court said:

"But even if there had been evidence to support the "plea, as it does not appear that the court was requested "to charge the jury upon the issue raised thereby, the "failure of the court to do so cannot be assigned for "error."

Express Co. v. Kountze, 8 Wall., 342.
Pennock v. Dialogue, 2 Pet., 15.

The power of this court to review is confined to exceptions actually taken at the trial. The matter must have been presented to the trial court for its ruling.

Pittsburg, Cin. & St. Louis Ry. Co. v. Heck, 102 U. S., 120.
Zellers Lessee v. Eckert, 4 How., 289.
Phelps v. Mayer, 15 How., 160.
Belk v. Meagher, 104 U. S., 279.

But if this point were competently before the court, the proposition that outside of and in addition to the doctrine of contributory negligence, and outside of the law of master and servant, there is a principle of law to the effect that a person having knowledge of the unvestibuled condition of the platforms and crossing them with that knowledge, cannot recover for the negligence of the defendant in leaving the platforms uninclosed—or open at the sides—that passing over the defective way with knowledge of the defect, as a matter of law, is a plain case of risk assumed by the deceased, and a bar to a suit for the negligence occasioning the defect and consequent injury, is uttery unsound. It is sufficient to say that the law knows no such doctrine. Mere knowledge of the defect when passing over the platforms is not, as a matter of law, a bar as being an "assumption of the risk."

Crane Elevator Co. v. Lippert (C. C. A.), 63 Fed., 942.

Ind. & St. L. R. R. Co. v. Horst, 93 U. S., 291.

Kelly v. Blackstone, 147 Mass., 448.

Lawless v. Conn. River R. Co., 136 Mass., 1.

Looney v. McLean, 129 Mass., 33.

Harris v. Township, 64 Mich., 447; 8 Am. St. Reps., 842.

Nolan v. Brooklyn City & N. R. R. Co., 87 N. Y., 62.

The Evansville & T. H. R'd Co. v. Crist, 116 Ind., 451.

III

The doctrine of "assumption of the risk" has no place in the law of common carriers of passengers. The expression and doctrine have their birth and exclusive application in the law of master and servant. The "assumption of the risk" rests on an implied contract between the master and the servant. The contract implied is that the servant takes the risk of the negligence of other servants of the same master, engaged in the same work; that is, he "assumes the risk," and by so doing releases the master from the operation of the rule of *respondent superior*. There is no principle of law out of which an implied contract can be raised between the carrier and the passenger on which the "assumption of the risk" of the carrier's negligence can rest, and it can not be made to rest elsewhere than upon an implied contract.

Chicago & St. P. R. R. Co. v. Ross, 112 U. S., 377.
Gardner v. Mich. Cen. R. R. Co., 150 U. S., 349.
Balt. & O. R. R. Co. v. Baugh, 149 U. S., 368.
Farwell v. Boston & Worc. R. R. Corp., 4 Met., 49.
Hutchinson v. York N. C. & B. Ry. Co., 5 Exch. 351.
McNaughton v. Caledonian Ry. Co., 19 Ct. of Sess. Cases, 273.
Bartonshill Coal Co. v. McGuire, 3 McQueen H. L. Cases.

If a contract may be implied between the carrier and its passenger, whereby the carrier may be released from the necessity of taking care, the passenger undertaking —agreeing—to incur the risks, such a contract may be

written, and the carrier may limit his liability by the passenger himself assuming all of the risks incidental to railway travel. If this doctrine may be invoked between a carrier and passenger, the law must necessarily presume, from the act of the passenger, that he voluntarily exposes himself to the consequences of the carrier's negligence, and that he intends, and by the act declares his intention, that the carrier shall not be liable to him for injury from such negligence—that he "assumes the risks." This is an agreement on the part of the passenger that the carrier shall not be liable for its own negligence. Such an agreement or consent can not, as this court has heretofore ruled, be enforced, but even though an express agreement to this effect could be enforced, the law will certainly not *create* such a contract by *implication*.

The *N. J. Steam Nav. Co. v. The Merchants Bank*, 6 How., 383.

This doctrine has no place in the case at bar, and the only way in which the action of the deceased can be called in question, if at all, is under the doctrine of contributory negligence.

Crossing an open platform, even though deceased knew it to be so, was not *per se* contributory negligence. This is true in the abstract; it is especially true where the passenger crosses at the invitation of the carrier. The deceased, if he knew that the platforms were *entirely* unguarded at the sides, had the right to assume that the train would be run with great care at the curves

in view of the invitation to cross and the open condition of the platforms.

McAfee v. Huidekoper (D. C. App.), 34 L. R. A., 720.
Ches. & O. R. Co. v. Clowes, 93 Va., 189; 24 S. E., 833.
Graham v. McNeill, 20 Wash., 466.
Werle v. Long Island R. R. Co., 98 N. Y., 650.
Vaslee v. Grant, etc. R. Co., 16 Wash., 602.
Warner v. B. & O. R. Co., 168 U. S., 339.
Craven v. McLeod, 92 Fed. Rep., 846.

In the absence of an eye witness the law presumes that, at the time of the accident, the deceased was in the exercise of due care, and the burden of proof to the contrary, by a preponderance of the evidence, was on the defendant.

Tex. & Pac. R. Co. v. Gentry, 163 U. S., 353.
Cameron v. Gt. N. Ry. Co., 77 N. W. Rep., 1020.
Ind. etc. R. Co. v. Horst, 93 U. S., 291.
Phillips v. Mil. & N. R. Co., 77 Wis., 349; 46 N. W., 543.

If there was any ambiguity in the instruction in this regard, it was the duty of the defendant to bring it to the attention of the trial court and have it corrected.

Ind. etc. R. Co. v. Horst, 93 U. S., 291.
Flanders v. Tweed, 16 Wall., 504.
Balt. & P. R. Co. v. Mackey, 157 U. S., 96.

The question of whether the conduct of the deceased constituted contributory negligence, if in this case at all, was clearly for the jury and not for the court.

Richmond & Dan. R. Co. v. Powers, 149 U. S., 45.
Grand Trunk R. Co. v. Ives, 144 U. S., 408.

On page 20 of petitioner's brief, on the application for the writ of certiorari here, petitioner complained of the Circuit Court of Appeals, saying that it "so far failed to "apprehend the defendant's position as to say (Trans., "orig. p. 886) our claim was that he (deceased) was "guilty of contributory negligence in passing over the "platforms. No such proposition was made in the court "below or will be asserted here," the offense of the court below being that it failed to recognize the doctrine of the "assumption of the risk" as that upon which petitioner could defend. It is not surprising that the Circuit Court of Appeals, as well as the trial court, should have failed to understand that the defendant did not assert and rely upon contributory negligence on the part of the deceased, but was relying on "assumption of the risk," in view of the fact that the defense of contributory negligence is expressly and fully set up in defendant's amended answer (Trans., orig. p. 62) on which it went to trial, and in which there is no word of "assumption of the risk," and in view of the fact that the record is barren of any request for an instruction as to the latter doctrine.

In view of this condition, not knowing exactly what will finally be contended for here, we deem it wise to

present to the court the facts showing the actual conduct of the deceased, for their bearing either on the doctrine of contributory negligence, or that of "assumption of the risk."

And first we call attention to a misstatement of fact made in petitioner's brief on the application for the writ, and which we presume will be repeated for its bearing on the doctrine of the "assumption of the risk," namely, that the deceased, in boarding the train, got on by an unvestibuled platform.

This court will not consider the weight of evidence, and for all purposes here the evidence on behalf of the plaintiffs controls. Mr. Gabbert swore positively that he and Mr. Adams (deceased) got on the train between the day coach and smoking car (Trans., orig. pp. 89, 95), and he remembered that the day coach was vestibuled and he did not remember as to the smoking car (Trans., orig. pp. 95, 98). It is an admitted fact in the case that both the smoking car and the day coach were vestibuled (Trans., orig. p. 85). It is apparent, therefore, that the deceased and Mr. Gabbert boarded the train by a vestibuled platform according to this evidence, that it was not admitted to the contrary, and that, if there was evidence in conflict with this, it was at most a question for the jury.

It was also stated in the same brief (p. 18), that the trial court instructed the jury that it was true that deceased got on the train by an unvestibuled platform. This assertion is entirely without warrant and is not correct. The court assumed that the platforms were open to the view when approached by any one with the

intention of crossing. The tourist car being between the smoker and the dining car, the deceased crossed both platforms of the tourist car in going to the diner, and since the deceased *could*, as the court assumed, see the absence of the vestibules when he approached each platform of the tourist car when going to the diner from the smoker, the court held that he did see that the tourist car was without vestibules, and acted in passing over the platforms with that knowledge (Trans., orig. p. 820). The instruction cannot be tortured into more than this.

The deceased left the smoking car to go the diner shortly after the train left Hope, and while the train was going at a moderate rate of speed (Trans., orig. pp. 90, 91, 94, 104, 105, 116). The *usual* rate was moderate from Hope to Sand Point (Train schedule, exhibit A6). He did not leave the smoker until after the conductor had taken up his fare (Trans., orig. pp. 387-391). The train went at moderate speed until it reached about the east end of the Pack River trestle (Trans., orig. pp. 90, 91, 94, 104, 105, 116.), which point was about four miles from Hope. In order for the deceased to have gotten from the smoker into the diner, and to have transacted his business there, and to have started back by the time the train reached the point where his body was found, it was necessary for him to leave the smoker shortly after leaving Hope, and before the train reached the east end of the trestle. He was a short, heavy man, and necessarily moved slowly. He had to go from the front end of the smoker back to its rear end, open and close the door of the smoker,

cross the platform of the smoker and the platform of the adjoining day coach, open and close the door of the day coach, passing within, pass down the length of the day coach, open the door of the day coach, pass out, close it, cross the platform of the day coach, cross the platform of the tourist sleeping car, open the door of the tourist sleeping car, pass in, close the door, pass down the length of the tourist sleeping car, open the rear door of the tourist sleeping car, pass out, close it, cross the platform of the tourist sleeping car, cross the platform of the dining car, open the door of the dining car, pass within, close the door and pass to the center of the dining car, where he took a seat; during all of which the train was rolling on. He then had a conversation with the waiter in the dining car, telling him that he desired cigars. The conductor of the dining car was absent, and the waiter went back half the length of the dining car, opened the rear door, passed out, closed it, crossed the rear platform of the dining car, crossed the front platform of the Pullman sleeper, opened the door, passed within, closed the door, and passed down a part of the length of the sleeping car until he found the conductor of the dining car. The waiter then told the conductor of the dining car that there was a gentleman in the dining car who wished cigars; the conductor of the dining car then returned with the waiter, going part the length of the Pullman sleeping car, the door of which the waiter opened, and the conductor passed through, crossed the two adjoining platforms, opened the door of the dining car, passed within,

and passed half its length forward to where the deceased was sitting, who rose to meet him. A conversation then took place in which the deceased stated that he wanted cigars and indicated the kind he wanted; the dining car conductor then went back to the locker in which the cigars were kept, the door of which was locked, took from his pocket a bunch of keys and selected therefrom the appropriate key, unlocked the door, found within, from the various boxes of cigars, the box containing the kind of cigars which the deceased desired, and returned with them to the deceased, who thereupon gave the conductor a quarter in payment. Thereupon the deceased turned and walked slowly forward half the length of the dining car, opened its front door, passed out and closed it (Trans., orig. pp. 475-490).

During all of this progress through the train, and the waiting for the conductor in the dining car, and the transaction of the business there, the train was rolling on, and, at the time the deceased turned from the conductor of the dining car to go forward, the train was off the west end of the Pack River trestle (Trans., orig. p. 482). It is manifest that for a heavy man, over 200 pounds, to make such a journey through the train, wait in the diner as he waited, and be through with his business in the dining car just after the train left the west end of the Pack River trestle, he must have left the smoking car shortly after the train left Hope, and a considerable time before high speed was developed, and he had no warning which could have induced him to keep his seat in the smoker. The high speed began about the west end of the Pack River trestle

(Trans., orig. pp. 105, 117, 118); the train was going fifty miles an hour just west of the trestle (Trans., orig. pp. 117, 118, 105, 106), and from that up to sixty miles an hour at the point where the body was found (Trans., orig. pp. 104-106, 117-118, 128-134, 94, 95). From the west end of the Pack River trestle to the point where the body was found was one mile and 3,480 feet, or forty feet less than one mile and two-thirds (Trans., orig. pp. 191, 192, 142, 145, 149, 150, 187, 188, 175-180). The train, therefore, ran, after the high speed developed, about a mile and two-thirds with the deceased on it, and ran that mile and two-thirds at from fifty to sixty miles an hour, according to the testimony. If we make a conservative average of the testimony, and say fifty-five miles an hour, we have nearly two minutes consumed in running from the west end of Pack River trestle to the point where the deceased was thrown from the train, and, therefore, on this average, the very high speed was in operation less than two minutes before deceased was thrown off. During a part of this two minutes the deceased had his mind occupied in the purchase of the cigars from the dining car conductor, and it was, during all the time, fixed on returning to the smoking car where his overcoat was left and his friend awaited him. The sharp curves, such as would produce lurching and might call an ordinary traveler's attention to excessive speed, were some little distance west of the west end of the Pack River trestle. Immediately east of the curve at which deceased was thrown from the train is a tangent, a perfectly straight piece of track, 990 feet in

length, on which the train would run steadily without lurching or lateral motion (Trans., orig. p. 190). Now, under these circumstances, it has been seriously urged that this court will usurp the functions of the jury and will conclusively presume that within this flash of time, the deceased did fully realize and know that the defendant had raised its speed to a dangerous pitch, and would maintain it at such point, so that it would be perilous for the deceased to return to the smoking car. To so assume that he would have known within this brief space that the speed was such as would put him in peril in crossing the platforms, charges the deceased with an instantaneous perception of changes in the condition of speed *and the reaching of the danger point*, which is not had by mankind at large. This is a matter also which one not connected with the train would be slow to give his attention to, it not being his duty to notice and observe such matters, nor is he charged primarily with his own safety in regard to them. He had the right to be slow to realize that the train would be run at such speed as to put passengers, while rightfully conducting themselves upon it, in peril. The dining car conductor, a railroad man of long experience, evidently did not realize, at the time deceased left the dining car, that the running of the train had been so changed in that scant period as to make the ordinary uses of it attended with peril, for he watched the deceased slowly leave the car, which the open platform adjoined, without a word of warning (Trans., orig. pp. 481-483). If, however, the dining car conductor, from his great familiarity with

trains, and with the duty on him of protecting passengers, had so quickly realized the change in the running of the train from a normal condition to one of danger to passengers, and if the deceased, notwithstanding the natural presumption and rightful reliance on the fact that the train men were doing their duty, might have been as quick as the expert to note such change and its import, the action of his mind to this effect and to the realization of his danger, would have been clogged and stopped by the silence of the experienced and responsible dining car conductor, which silence proclaimed to him that what he was then doing, under that conductor's eye, might be safely done.

Even though the deceased can be held charged, at his peril, to know the rate of speed maintained each minute by the carrier, whose duty it is to maintain a safe speed every minute, and must be further held to be able to apportion properly the increase of danger to each additional mile in the rate of running, yet, nevertheless, with a space of only two and a half or three feet to cross, with the invitation of the carrier to cross it, with the conductor looking on without warning or objection, and with the air brake to moderate the lurching at the curves, the failure to use which the deceased could not anticipate, with the exercise of care by the deceased in crossing (he was exercising care when last seen. Trans., orig. pp. 482, 484), having been induced to go to the dining car by the rightful presumption that he might return to the smoker safely, his overcoat and companion being in the smoker, and the dining car being neither a

smoking car or a sitting car—the doing of the act does not import such peril as to make it, under these circumstances, an unreasonable act for an ordinarily prudent man to do, and it is certainly not, as a matter of law, negligence.

Mere knowledge of the greater speed maintained, if the deceased had it, does not make the question one for the court. It is still a question for the jury whether, *in view of all the attending circumstances*, going back to the smoker was negligence.

Crane Elevator Company v. Lippert (C. C. A.), 63 Fed., 942.

New Orleans & N. E. R. Co. v. Thomas (C. C. A.), 60 Fed., 379.

Ind. & St. L. R. R. Co. v. Horst, 93 U. S., 291.

Filer v. N. Y. Cent. R. R. Co., 59 N. Y., 351.

If it be assumed that the increased volume of sound, as the deceased took the step across the narrow platform, necessarily told him that the platform was not vestibuled, it would not necessarily have told him that the carrier had defaulted in his whole duty and had not put a chain, or rail, or iron gate at the sides of the platform.

In taking the step across the platform, on a moving train, a careful man necessarily fixes his eyes directly in front of him on the rail or object which he intends to grasp to steady himself, and does not look to the sides of the platform. This is common experience, and the deceased may well have crossed the open platform without acquiring the knowledge that it was not guarded by

rail, chain or gate, as it should have been, and he therefore cannot be held charged with the knowledge that the platforms were *entirely* unguarded. In this connection also the facts are pertinent that deceased's eyesight was not good (Trans., orig. p. 213), and it was a cloudy day and growing dark (Trans., orig. pp. 100, 101, 108, 114, 260, 261).

"If inferences other than that of contributory negli-
"gence may be fairly drawn from all the evidence and
"facts shown to exist, then the question is one of fact for
"the jury to decide * * * * 'In general, it cannot
"'be doubted that the question of contributory negli-
"'gence is a question of fact, and not of law. Whenever
"'there is any doubt as to the facts, it is the province of
"'the jury to determine the question; or whenever there
"'may reasonably be a difference of opinion as to the in-
"'ferences and conclusions from the facts, it is likewise a
"'question for the jury; it belongs to the jury not only
"'to weigh the evidence and to find upon the questions
"'of fact, but to draw conclusions as well alike from
"'disputed and undisputed facts.'"

Southern Pacific Company v. Harada (C. C. A.), 109 Fed., 379.

All of these many circumstances bearing on whether the deceased was guilty of negligence or not, have been passed upon by the jury; the judge who heard the evidence and saw the witnesses refused a new trial (Trans., orig. pp. 676-80).

In the language of the court in *Sioux City & Pac. R. R. Co. v. Stout*, 17 Wall., 657:

"It is this class of cases and those akin to it that the "law commits to the decision of a jury. Twelve men "of the average of the community, comprising men of "education, and men of little education, men of learn- "ing and men whose learning consists only in what "they have themselves seen and heard, the merchant, "the mechanic, the farmer, the laborer; these sit to- "gether, consult, apply their separate experience of the "affairs of life to the facts proven, and draw a unani- "mous conclusion. This average judgment thus given "it is the great effort of the law to obtain. It is assumed "that twelve men know more of the common affairs of "life than does one man; that they can draw wiser and "safer conclusions from admitted facts thus occurring, "than can a single judge."

III.

Assignments of Error 2, 3.

(Trans., orig. pp. 836-7.)

The evidence complained of was that as the deceased left the smoking car he stated that he was going to the dining car to get cigars (Trans., orig. pp. 90, 91).

The fact to be proved was that deceased was thrown from an open platform and so killed.

His *intention* to go to a car to reach which he had to cross such open platform, would make it probable that he did go and did cross such platform, and would be,

therefore, a distinct fact in the chain of circumstances pointing to the manner of his death. This evidence was properly admitted.

Mut. Life Ins. Co. v. Hillmon, 145 U. S., 285.
Inness v. Boston R. B. & L. Co. (Mass.), 47 N. E., 193.
2 *Jones Law of Evidence*, § 351, note 5.

But if this were not so and its admission was error, it was error without prejudice, because the defendant itself by its own witness proved the only fact shown by this evidence, viz., that the deceased did go to the dining car and did leave there on his return toward the smoking car, and so passed on to the open platform of the tourist sleeping car, which lay between the diner and smoking car (Trans., orig. pp. 480-484). Further, defendant admits that deceased went to the dining car and purchased a cigar, and left the diner to return to the smoking car (Amended answer, par. 7, Trans., orig. p. 60). This testimony could have no other bearing.

Error without prejudice is not ground for reversal.

Cavazos v. Trevino, 6 Wall., 773.
Chicago v. Greer, 9 Wall., 726.
Brobst v. Brock, 40 Wall., 519.

Assignments of Error 4, 5.

(Trans., orig. p. 837.)

The distances between the place where the body lay when found, the places where it appeared to have struck,

and various points on the track, were material to the issue as tending to show how the deceased came to his death, and the high speed of the train. The work called for a civil engineer, and the only way to secure accurate measurements and relations of the body to the track, and so to the train, was for a competent engineer to determine them. Mr. Bowen was a civil engineer, and testified as to what he was told only to show that the measurements were made from the material points on the ground to which the witnesses, who pointed them out to Mr. Bowen, themselves testified.

There is no element of hearsay in the testimony. The measurements were in Mr. Bowen's own knowledge. It was not attempted to prove by him where the body struck or lay. These points were competently proved by the witnesses who examined the ground at the time the body was lying there (Trans., orig. pp. 191, 192, 142-145, 149, 150, 187, 188, 175-180).

Assignments of Error 6, 7, 8, 33.

(Trans., orig. pp. 837-8, 854.)

The fact that the deceased was, at the time of his death, giving the plaintiff Frank H. Adams a college education, maintenance and support, and the intention of the deceased, shown in the plans arranged by himself and the said plaintiff, for a continuance of the education in progress, at the Harvard Law School, and the intention of the father to instruct the said plaintiff in the practice of the profession of law, were all facts certainly giving the son a reasonable expectation of future benefits from the

father, having a pecuniary value, and was evidence tending to show the jury the reasonableness of the said plaintiff's expectation in that regard.

A reasonable expectation of pecuniary benefit is all that it is necessary to prove to entitle plaintiffs to recover:

"The damages must be based on pecuniary loss, "actual or expected, and should be calculated in refer- "ence to a reasonable expectation of pecuniary benefit, "as of right or otherwise, from the continuance of the "life. Potter v. C. & N. W. R. Co., 12 Wis., 371; "Evans v. C. & N. W. R. Co., 38 Wis., 613."

Shober v. St. P. M. & M. Ry. Co. (Minn.), 9 N. W., 575.
Scheffler v. M. & St. L. Ry. Co., 21 N. W., 711.
Collins v. Davidson, 19 Fed. Rep., 83.
Serensen v. Northern Pac. R. Co., 45 Fed. Rep., 407.
Texas & Pac. Ry. Co. v. Wilder, 92 Fed. Rep., 953.
Demarest v. Little, 47 N. J. L., 28.
City of Chicago v. Keefe, 114 Ill., 229, 230.
Ill. Cent. R. R. Co. v. Barron, 5 Wall., 90.
O. & M. Ry. Co. v. Voigt, 122 Ind., 288.
Oldfield v. N. Y. & H. R. R. Co., 14 N. Y., 310.
O'Mora v. Hudson R. R. R. Co., 38 N. Y., 445.

The loss for which compensation may be recovered is not restricted to actual money, but to anything having a pecuniary value, as education, instruction, etc., etc.

Tilley v. Hudson R. R. R. Co., 24 N. Y., 471.
I. C. R. R. Co. v. Weldon, 52 Ill., 294.
Walker v. McNeil, 17 Wash., 582.

Damages are not restricted to the loss of pecuniary benefits which the plaintiffs had a legal right to demand of the deceased, nor, where the plaintiff is a child of the deceased, must he be a minor child in order to recover; there is no such restriction on the right to sue, or on the age at which the pecuniary loss must be sustained, in the statute. As was said in *Louisville, E. & St. L. R. Co. v. Clarke*, 152 U. S., 240:

"The statute imposes no other condition upon the "right to sue. The court has no authority to impose "an additional or different one."

Illinois Central R. R. Co. v. Barron, 5 Wall., 90.
Texas & Pac. Ry. Co. v. Wilder, 92 Fed. Rep., 953.
Collins v. Davidson, 19 Fed. Rep., 83.
Serensen v. N. P. R. R. Co. 45 Fed. Rep., 407.
Demarest v. Little, 47 N. J. L., 28.
Tilley v. Hudson R. R. R. Co., 24 N. Y., 471.
City of Chicago v. Keefe, 114 Ill., 229 230.
Shober v. St. P. M. & M. Ry. Co. (Minn.), 9 N. W., 575.

The objection to the testimony of the witness Frank H. Adams, rests substantially on the ground that it is immaterial what was the *intention* of the deceased.

The reasonable prospect and expectation of the plaintiff, Frank H. Adams, to receive pecuniary benefits from the deceased, rested entirely on the *intention* of the deceased. That intention might be inferred from the doing of present acts of benefit, from the parental relation and from the earnings of the father, but it is submitted that

to raise a reasonable expectation of legal education and the instruction and start of the son in the practice of the law, and his maintenance and support after he became of age, the declaration of such an *intention* on the part of the deceased, was both material and competent to *aid* the jury.

Mut. Life Ins. Co. v. Hillmon, 145 U. S., 285.
A. T. & S. F. Ry. Co. v. Ryan (Kan)., 64 Pac., 603.

The fair value of the Harvard Law School course was the cost, and it was certainly competent evidence to aid the jury in reaching a conclusion. That the plaintiff, Frank H. Adams, who was suing in his individual right, and not as administrator was also administrator of the estate of the deceased, is quite immaterial in this connection.

The statute of Idaho governs the damages.

Northern Pac. R. Co. v. Babcock, 154 U. S., 198.

In the absence of any restriction there, it is a question of general law for this court.

Lake Shore & Mich. South. Ry. Co. v. Prentice, 147 U. S., 101.

Assignment of Error 9.

(Trans., orig. p. 839.)

Funeral expenses, if paid by the plaintiffs, are a proper element of damages.

Owen v. Brockschmidt, 54 Mo., 289, 290.

Petrie v. Col. G. R. Co. (So. Car.), 7 S. E., 515-523.
Murphy v. New York Central & Hudson R. R. R. Co., 88 New York, 445.
Pa. Co. v. Lilly, 73 Ind., 254.
Tiffany on Death by Wrongful Act, § 157.

There was no testimony introduced, however, showing, or tending to show that the plaintiffs, or either of them, paid the funeral expenses of the deceased. The only evidence in the record touching the funeral expenses is that of Frank H. Adams (Trans., orig. pp. 230, 231). This evidence consists merely of some preliminary questions; first as to whether he *knows* the cost of the interment of his father, and second, what that cost was. The testimony on the subject there stops; he is not asked who paid it; he does not state who paid it, and there is no evidence introduced showing who paid it. If the proof of loss in the way of funeral expenses were incompetent, and the proof of the cost had been followed by proof that the amount was paid by the plaintiffs, the question and answer relative to the cost might have been prejudicial. Standing alone, without any evidence whatever that plaintiffs paid it, or became obligated to pay it, it was without prejudice. It will not be presumed that the jury gave plaintiffs the amount of the funeral expenses, in the absence of any evidence whatever that they suffered any loss by having to pay them. The testimony regarding the cost of interment, therefore, is without prejudice.

Lancaster v. Collins, 115 U. S., 222.

And in this connection the harmless character of the question and answer is aided by the court's charge that the plaintiffs could recover only for pecuniary loss (Trans., orig. p. 852).

Assignment of Error 10.

(Trans., orig. p. 839.)

The minute characteristics of a wound could not be described so as to enable one without experience in such matters, or surgical knowledge, to form an accurate idea as to how it was made. From the nature of the case an opinion was admissible (Trans., orig. pp. 238, 239).

1 *Jones Law of Ev.*, § 362.
Louisville, N. A. & C. Ry. v. Miller (Ind.), 37 N. E., 343.

The witness had a long familiarity and experience with wounds of all kinds, and was qualified to express an opinion.

No exception was taken to the court's ruling on defendant's objection and it cannot be considered (Trans., orig. pp. 238, 239).

Pool v. Lessee of Fleeger, 11 Pet., 185.
Phelps v. Mayer, 15 How., 160.

Assignment of Error 11.

(Trans., orig. p. 839.)

The question and answer tested the strength and security of the fastening on the gate under pressure, and

the completeness with which it filled up the opening. That one could not get through the opening when the particular gate in use was closed, was a fact within the personal knowledge of the witness, not an opinion, or conclusion (Trans., orig. pp. 248-250).

If it be considered an opinion, from the nature of the case it was admissible.

1 *Jones Law of Evidence*, § 362.
L., N. A. & C. Ry. v. Miller (Ind.), 37 N. E., 343.

The device was a railroad safety appliance, the witness was a railroad man of long experience, and it was competent to show his knowledge of the effect of the appliance. In any event it was without prejudice.

Assignment of Error 12.

(Trans., orig. p. 840.)

The question, as finally explained, tended to show how rapidly the vestibuling appliance could be adopted, and was so answered (Trans., orig. p. 254). This was material and competent in view of the charge of negligence in not adopting some appliance, and in view of the fact that it had been in known practical use for six or seven years. The defense attempted was that defendant had used the utmost diligence in adopting this appliance (Trans., orig. pp. 651, 652). But there was no exception taken to the court's ruling on defendant's objection, and this assignment cannot be considered (Trans., orig. p. 254).

Poole v. Lessee of Fleeger, 11 Pet., 185.
Phelps v. Mayer, 15 How., 160.

Assignment of Error 13.

(Trans., orig. p. 840.)

The witness Gilbert was asked what the defendant had done in the way of vestibuling its cars *subsequent* to the killing of deceased, that is *since* the 13th day of November, 1898. The matter called for is so patently immaterial and incompetent that mere references to it is sufficient.

Furthermore, no exception was taken to the court's ruling (Trans., orig. p. 652), and it cannot be considered.

Pool v. Lessee of Fleeger, 11 Pet., 185.
Phelps v. Mayer, 15 How., 160.

Assignment of Error 14.

(Trans., orig. p. 840.)

The testimony called for was cumulative, other witnesses for defendant having testified to the same matter, and the court had a right to limit it (Trans., orig. pp. 736, 737, 317, 318).

3 *Jones Law of Evidence*, § 814.

The question called for the condition of the water, *prior* to the accident, and the matter so called for was, therefore, immaterial.

No exception was taken to the court's ruling, and, therefore, this assignment cannot be considered (Trans., orig. p. 405).

Pool v. Lessee of Fleeger, 11 Pet., 185.
Phelps v. Mayer, 15 How., 160.

Assignment of Error 15.

(Trans., orig. p. 841.)

This is without force. No testimony was offered by defendant as to what the *witness Humphrey* did as to assisting the deceased on to the train. Plaintiff made no objection to such testimony, nor did defendant take an exception to the court's ruling on such an objection (Trans., orig. pp. 495, 496).

Assignments of Error 20, 25, 26 and 27.

(Trans., orig. pp. 843, 846, 848.)

The rule of care governing the carrier of passengers is discussed on page 87 of this brief.

That the duty which the carrier is under, to observe this rule and exercise the care exacted, is a public duty, a duty which he owes to the public, and does not rest on contract, is undoubtedly true.

Grand Trunk Ry. v. Stevens, 95 U. S., 655.
Chi. M. & St. P. R. R. Co. v. Solan, 169 U. S., 135.
Munn v. People of Illinois, 94 U. S., 113.
Phila. & Read. R. R. Co. v. Derby, 14 How., 468.

There was no possible injury to the defendant in the court's stating that it was the public duty which the carrier was bound to perform in this case, and not the duty he owed the deceased, inasmuch as the duty in regard to care owed by the carrier to the public and to the deceased was absolutely identical. And inasmuch as the carrier owes to the passenger the *highest* degree of

care, any implication that the case might rest on other relations than those of passenger and carrier could not be to defendant's prejudice. The carrier's duty in regard to the care demanded in this particular case was very carefully and plainly defined by the court.

If there was any ambiguity in the instructions, the defendant should have had it corrected.

Ind. etc. R. Co. v. Horst, 93 U. S., 291.
Flanders v. Tweed, 16 Wall., 504.

Assignments of Error 21, 22.

(Trans., orig. pp. 843, 844.)

We presume that under these two assignments defendant will urge that the jury was instructed by the court that they might award exemplary damages in this case. The sentence set out in assignment 21 and contained also in assignment 22, referring to exemplary damages, is in paragraph six of the court's instructions, and is as follows:

"And in every such action the jury may give such "damages, pecuniary or exemplary, as under all the "circumstances of the case may to them seem just." (Trans., orig. p. 802.)

This sentence when read in connection with the instruction of which it forms a part, and with the whole of the charge, cannot by possibility be held to have conveyed to a jury of average intelligence that in *this* case they should or might give exemplary damages.

The charge must be taken as a whole and cannot be condemned because a single paragraph, taken alone, is erroneous or might be misleading, if the charge as a whole makes the meaning clear and conveys the correct rule.

Baltimore & P. R. Co. v. Mackey, 157 U. S., 72.
Railroad Company v. Gladmon, 15 Wall., 401.
Kerr, Murray Mfg. Co. v. Hess (C. C. A.), 98 Fed., 56.
Stewart v. Wy. Cattle Ranch Co., 128 U. S., 383.
Northern Pacific Ry. Co. v. Babcock, 154 U. S., 190.
Etna Life Ins. Co. v. Ward, 140 U. S., 76.

That the court had no intention of instructing the jury in this sentence as to what damages they might or should give in this particular case is at once manifest upon reading the whole of paragraph six.

In order that the plaintiff might bring their action in Washington, it was necessary that the law of Idaho, where the negligence and death occurred, should not conflict with the law of Washington in regard to the right to bring an action and recover damages, and to this point the court was addressing itself, and was explaining to the jury how it was that the plaintiffs could recover in the state of Washington for the negligence and death in Idaho. (*Stewart v. B. & O. R. R. Co.*, 168 U. S., 445.) For the purposes of this explanation, he showed that the statutes of both states permitted an action for death and a recovery of damages, and, in showing that the statutes of these states were similar,

he seems to have quoted the language bearing on the right of action and the recovery of damages verbatim from the statute of Washington, instead of from the statute of Idaho, and the jury was informed necessarily from the language that the court was stating in an abstract way the statutes of the two states for this purpose only.

Now, in this abstract way, and for this general purpose, the court used the language complained of, which states to the jury generally that juries, under these statutes, may give "pecuniary or exemplary" damages.

Assuming that the jury knew the peculiar technical, legal significance attaching to the word "exemplary," the court's language is that juries may give, under that law, "pecuniary *or* exemplary" damages, not pecuniary *and* exemplary damages. One or the other, by the court's language, may be given; not both. This is plain and unambiguous language, and the jury must be held to have received it as such, and not in any technical way. Now, having laid down the abstract proposition that under these laws one or the other kind of damages might be given in fitting cases, the court proceeds throughout the whole charge to instruct the jury clearly and unmistakably *which* of these two kinds of damages are to be given by them in *this* particular case. They are informed that in this particular case the fitting damages and those which are claimed by the plaintiffs, and those which are to be given by the jury, are pecuniary damages, compensatory damages; that the object of the suit is to make the plaintiffs whole. The

charge from beginning to end is saturated with this theory, upon which the case was tried, which is shown in the pleadings, in the testimony, and upon which the court clearly intended to direct a recovery, if recovery was had.

In paragraphs four and five of the instructions, preceding the use of the language complained of, the court states that this is an action of tort "for which the law "imposes the liability upon the wrongdoer to *render* "*compensation* to the injured party. Now this case be- "longs to the latter classification. It is an action of "tort; a wrong is charged against the defendant in the "case towards the plaintiffs, causing them injury *of* "*a pecuniary nature, entitling them to compensation in* "*money to make good* as far as it is possible *the loss* "*which they have sustained of a pecuniary charactar.* "* * * The law endeavors to give *just compensation* "for an injury of *a pecuniary nature*, so you will regard "this case as one in which *the rights of the plaintiffs* "*depend* upon the truth of the charge which they make "against the defendant of having committed a wrong "towards them, which resulted in an injury to them "*of a pecuniary nature.*"

Immediately following the sentence complained of, referring to "pecuniary *or* exemplary" damages, the court again states which of these damages may be recovered by the plaintiffs in this particular case under the law which the court in an abstract way has just quoted. "Under this law the plaintiffs have a right of action to recover *compensation for their own loss.*" (Par. 7.)

And in the next paragraph (8) the court refers to the pleadings which were sent to the jury room and says: "The rights of the parties which they contend for are stated by them in their pleadings." Nowhere in the pleadings are exemplary damages asked for, and "the rights of the parties" which the court refers to as being set out in the pleadings, so far as plaintiffs are concerned, are stated to be compensation for losses to them.

In paragraph 31 of the charge, the court says: "They "are not seeking to recover anything for the physical "pain which he suffered, but they are complaining "of an injury to them by being deprived of his support, "and the pecuniary benefit which his life was to them." The same thought is conveyed in paragraph 32 of the charge.

In paragraph 38 of the charge the court, beyond the possibility of mistake, defines and restricts within fixed limits the character of damages which the jury may give in this particular case, as follows:

"You are instructed that, if you find for the plaintiffs, "or either of them, you will allow them, or either of "them, *such* damages as you deem to be reasonably "sufficient to make good to the plaintiffs, or either of "them, *the pecuniary loss to them* or either of them, "caused by the death of Jay H. Adams. This *pecuniary* "*loss* is not limited to a present money loss, but in de- "termining *it* you may consider any evidence before "you tending to show what was the reasonable expecta- "tion of *pecuniary benefits* to the plaintiffs, or either of

"them, from a continuance of his life. By pecuniary "benefits is meant any benefits having a pecuniary or "money value."

The court then enumerates the elements which may be considered as entering into the pecuniary loss, to compensation for which the verdict is thus restricted. This single basis for a recovery is further emphasized in paragraphs 39 and 40 of the charge.

Finally, in paragraph 55, in closing his charge to the jury, and as the last thought and direction regarding damages in the charge, the court definitely instructs them to restrict their verdict to actual compensation for actual pecuniary loss:

"If you come to a conclusion in favor of the plain- "tiffs, then you have the further duty to assess the dam- "ages, governed by the principles which I have already "given you, *and render a verdict for such sums of money "as in your judgment may be a just compensation for the "pecuniary loss of each.*" (Trans., orig. p. 824.)

We submit that it is most patent that the court had no intention to and did not instruct the jury that in this case they might give exemplary damages, nor could a jury of average intelligence have been misled by anything in the charge into such an impression.

Chicago & N. R. Co. v. Whitton, 13 Wall., 270.

The charge is not even ambiguous in this particular; but even if the charge as a whole could be urged as am-

biguous on this point, the ambiguity, if by any torturing of the language in the charge it can be said to exist, could have been as clearly seen at the time of its delivery as now, and no request was made by the defendant to the court to have the ambiguity removed.

"Courts are not inclined to grant a new trial merely "on account of ambiguity in the charge of the court "to the jury, where it appears that the complaining "party made no effort at the trial to have the point ex- "plained."

Flanders v. Tweed, 16 Wall., 504.
Baltimore P. R. Co. v. Mackey, 157 U. S., 86.
Ind. & St. L. R. Co. v. Horst, 93 U. S., 291.

The very moderate amount of damages found by the jury in this case, in view of the uncontradicted evidence, upon the amount of loss, prohibits any supposition that examplary damages may have been given (Trans., orig. pp. 205-209, 215, 216, 224-230, 288-290, 285, 291, 292, 296, 297, 293, 294). There is no contradiction anywhere in the record of the evidence introduced by plaintiffs as to the amount of pecuniary loss suffered by them. Viewed in the light of this evidence, the verdict is a very moderate verdict as compensation for the actual losses sustained by the plaintiffs.

Where upon the merits justice has been done, the judgment should not be reversed because the jury, in reaching a righteous verdict, may be presumed to have, by possibility, done so upon an erroneous theory.

Atwater v. Whitman, 41 Fed., 427.
W. B. Grimes Dry Goods Company v. Malcom, 58 Fed., 670.
Eddy v. Lafayette, 49 Fed., 813.
Eddy v. Lafayette, 163 U. S., 456.
Sanger v. Flow, 48 Fed., 152.

Assignment of Error 39.

(Trans., orig. p. 850.)

This assignment of error is a criticism of the thirty-third paragraph of the court's charge.

The court, as heretofore shown, has unmistakably instructed the jury that the basis of recovery, and the only basis of recovery in the case that they can consider, is the pecuniary loss suffered by the plaintiffs. This basis of recovery is conspicuously established in the case, beyond the possibility of being overlooked or ignored. The court says in this instruction that, in determining this pecuniary loss, there is no "fixed measure" and no "artificial rule" by which the damages in a given case can be computed (Trans., orig. p. 850). How this can be considered other than the plain truth, we cannot conceive. Where the fixed measure is by which to compute the widow's loss, or the son's loss, or where the artificial rule is to compute them by, we are wholly at a loss to determine. There is no usual, customary, market value or market rate for the benefits flowing from the husband to the wife, or from the father to the son; no customary or usual value attaching to the widow's maintenance and support.

There is no contract price which might be referred to as a "fixed measure" or artificial rule"; there is no difference between the value, at the time of a contract and the time of its breach, of an article to be sold thereunder, that might be relied on as a "fixed measure" or an "artificial rule."

Balt. & P. R. Co. v. Mackey, 157 U. S., 92.

With the basis of recovery fixed beyond shaking in the jury's mind, namely, the actual pecuniary loss suffered, the "sound sense and good judgment" of the jury is the only reliance in fixing the "amount of damages." Who or what else can determine the amount? In view of the rigidity with which the court has restricted the jury to actual pecuniary loss in determining the amount of damages, a reliance on their good sense and sound judgment could not be a direction to them to give damages for injured feelings or anguish or mind. But the court has expressly excluded this from their consideration in paragraph five of the charge where he says:

"It is not practicable to take cognizance in a court of "justice of those injuries which are sentimental, and "affect the feelings and sentiments; but the law en- "deavors to give just compensation for an injury of a "pecuniary nature. So you will regard this case as one "in which the rights of the plaintiffs depend upon the "truth of the charge which they make against the defen- "dant, of having committed a wrong towards them which "resulted in an injury to them of a pecuniary nature."

There is no error in the instruction complained of under this assignment.

Ill. Central R. R. v. Barron, 5 Wall., 90.
2 *Ballinger's Annotated Codes and Statutes of Washington*, § 4828.
Revised Statutes of Idaho, § 4100.

Assignment of Error 31.

(Trans., orig. p. 852.)

There is no error in the instruction complained of in this assignment, which deals with the measure of damages.

Louisville E. & St. L. R. Co. v. Clark, 152 U. S., 242.
Ill. Central R. Co. v. Barron, 5 Wall., 90.
Baltimore & P. R. Co. v. Mackey, 157 U. S., 92.
Tilley v. Hudson R. R. R. Co., 24 N. Y., 471.
Serenson v. N. P. R. R. Co., 45 Fed. Rep., 407.
Nebraska City v. Campbell, 67 U. S., 590.
Collins v. Davidson, 19 Fed. Rep., 83.

Assignment of Error 32.

(Trans., orig. p. 853.)

The court takes judicial notice of the expectancy of life, as shown by standard life tables. The competency of these tables as evidence to aid the jury in determining the probable length of time the plaintiff, Louis H. Adams, would have received pecuniary benefits from the deceased will not be questioned.

In view of the unquestionable competency of such tables and of the fact that their contents cannot be disputed, the rule applicable is aptly stated in *State v. Moffatt*, 73 Me., 278:

"What can be established by indisputable proof may "be acknowledged without proof; what is notorious "needs no proof."

The court merely stated to the jury what the probable expectation of life was according to these tables. This was not error.

Gordon v. Tweedy, 74 Ala., 232; s. c., 49 Am. Reps., 813.

Atchison, Top. & S. F. Ry. Co. v. Ryan (Kan.), 64 Pac., 603.

McHenry v. Yokum, 27 Ill., 160.

Shover v. Myrick, 4 Ind. App., 7; s. c., 30 N. E., 207.

Eastabrook v. Hapgood, 10 Mass., 313.

Wager v. Schuyler, 1 Wend., 553.

Jackson v. Edwards, 7 Paige, 387.

Davis v. Standish, 26 Hun, 608.

Schell v. Plumb, 55 N. Y., 592.

Louisville etc. R. Co. v. Mothershed, 97 Ala., 261; s. c., 12 So. Rep., 714.

Kansas City etc. R. Co. v. Philips, 98 Ala., 159; s. c., 13 So. Rep., 65.

McDonnell v. Alabama Gold Life Ins. Co. (Ala.), 5 So. Rep., 120.

Scheffler v. Minneapolis etc. R. Co., 32 Minn., 518; s. c., 21 N. W. Rep., 711.

People v. Ins. Co., 78 N. Y., 114.
1 *Jones Law of Evidence*, § 130.
Alexander v. Bradley, 66 Ky. (3 Bush.), 667.
Abel v. Penn. Mut. Life Ins. Co., 18 West Va., 400.
Price v. Conn. Mut. Life Ins. Co., 48 Mo. App., 281.
Lincoln v. Power, 151 U. S., 436.

If error, it was without prejudice. As was said in *Miller v. Dumon* (Wash.), 64 Pac., 840:

"It would hardly seem, from the instructions as a "whole, that the jury could have been misled, nor does "their very moderate verdict so indicate."

It was Not Necessary to Plead or Put in Proof the Statute of Idaho.

(Assignment of Error 22, Trans., orig. p. 844.)

It was urged below that the statute of Idaho was not pleaded or put in evidence, and the case of the *Union Pacific Ry. Co. v. Wyler*, 158 U. S., 285, was relied on in this connection for a reversal. This fact was also called to the attention of this court in petitioner's petition for the writ of certiorari, as showing grievous error.

The case of *Union Pacific Ry. v. Wyler*, 158 U. S., 285, is sharply and fundamentally distinguished from the case at bar in the following particulars:

The complaint first filed in the Wyler case stated a good cause of action at the common law, viz., the retention by a master, with knowledge, of an incompetent servant and injury thereby to plaintiff. There was no room there for any presumption that it rested elsewhere.

There was no statute in Missouri on which it *could* rest, and the general or common law governed there. This was a distinct and fully stated cause of action at the common law, and from this a departure was made. There was no cause of action stated in the complaint at bar known to the common law. By no possibility from it can a common-law action or an intention to rely on a common-law action be inferred. There is a statute of the state which provides for the action (1 *Ball. Code*, § 4828) and a statute makes the common law silent where the statute speaks (*Sayward v. Carlson*, 1 Wash., 40, 41).

The court, in the case being considered, says: "It "seems impossible to conceive of language which could "more directly rest the cause of action on the general "or common law of master and servant." But in the case at bar, the action for death was utterly unknown to the common law and if brought at all it *had* to rest on statute. The court rests its conclusion in the Wyler case, that, in changing to a reliance on a statute from an action unmistakably originally brought as a common-law action, there was a departure, largely on the conclusion of the Georgia supreme court, but that court has squarely held that where the statute of the state of the forum authorized the action, amending in the statute of the state where the injury happened is not a departure, and does not constitute a new cause of action. It is manifest that where the statute of the forum authorizes the action, and there is no room for inference as to a common-law action, as in the case at bar, the amending in of the statute of the other state is but add-

ing one fact of a group going to make up the cause of action already pleaded.

The South Carolina Railroad Company v. Nix, 68 Georgia, 572.

We call attention to the close parallelism of this case with the case at bar, in contradistinction to the many radical differences between the latter and the Wyler case, some of which we have pointed out.

The case at bar not being a common-law action, and there being no departure by relying on statute law, as the complaint was obviously drawn to do, and the suit being brought in the federal court and not in the state court, the remarks regarding judicial notice of statutes in the Wyler case have no application, and it was neither necessary to plead or to offer to prove the statute of Idaho, it appearing that the killing occurred in that state. It was the duty of the federal court to administer the law of that state without its being pleaded or offered in evidence. The federal courts take judicial notice of the laws of the several states.

Covington Drawbridge Co. v. Shepherd, 20 How., 227.

Lamar v. Micou, 114 U. S., 218.

Owings v. Hull, 9 Pet., 607.

If it be assumed however, that the statute of Idaho should have been pleaded, we have shown that the complaint in the case at bar could have been amended in that respect, and, therefore, we submit, under the circumstances

of this case, it will be considered amended by this court.

The complaint was not demurred to, nor at any stage of the proceedings, in any way, was the omission therefrom of the Idaho statute pointed out or complained of.

Assignment of error No. 22 does not direct attention to the pleadings. The action was tried *both times* and throughout all of its stages on the theory that the laws of Washington and Idaho concurred in authorizing it, but there was never any demurrer or criticism of the pleading. At the argument in the Circuit Court of Appeals was the first suggestion of any defect there.

The defendant was not ignorant of the bearing of the Idaho statute in the very action being prosecuted. The existence of the statute could not be questioned. The question of pleading, not having been raised in the trial court, cannot be raised for the first time in this court. As was said by this court:

"It was in the power of the court to permit the petition "to be amended, and the proper amendments would "doubtless have been made if the objection had been "stated. It is presented for the first time in this court.

"Under these circumstances it must be held to have "been waived by the plaintiffs in error in the court be- "low, and they are concluded by that waiver in this court.

"There is another ground upon which this exception "must be overruled. It is not alleged that the findings "of the court were unwarranted by the proofs, nor that "the judgment does not conform to the law and justice "of the case, as the case is thus presented.

"The objection is purely technical. It lies wholly in "the variance between the averments of the petition and "the facts as found by the court. The thirty-second "section of the Judiciary Act of 1789, declares that the "courts of the United States, respectively, shall proceed "and give judgment according as the right of the cause "and the matter in law shall appear unto them, without "regarding imperfections, defects, or want of form in "such writ, declaration or other pleading, return process, "or judgment or course of proceeding whatsoever, ex- "cept those only in case of demurrer, which the party "demurring shall specially set down and express, to- "gether with his demurrer as the cause thereof."

Railroad Company v. Lindsay, 4 Wall., 650.
Van Ness v. The Bank, 13 Pet., 17.
Ewing v. Howard, 7 Wall., 499.

The case at bar was begun in the federal court and this rule operates without restriction.

It was variance at most when the court by taking judicial notice of the statute of Idaho put it in evidence (Trans., orig. p. 802). It could not have misled defendant and was not material.

Under the code of Washington, no variance is ma- "terial unless it shall have actually misled the adverse "party *to his prejudice* in maintaining his action or "defense *upon the merits.*" (2 *Ball. Code of Wash.*, § 4949.)

The code is further in accord with the Judiciary Act of 1789, by providing (2 *Ball. Code of Wash.*, § 6535):

"The supreme court shall hear and determine all causes "removed thereto in the manner hereinbefore provided, "upon the merits thereof, disregarding all technicalities, "and shall, upon the hearing, *consider all amendments* "*which could have been made as made.*"

Allend v. Spokane Falls etc. Co., 21 Wash., 324.

It would clearly appear to be a palpable miscarriage of justice, both under the ruling of this court and under the laws of the state of Washington, if a reversal should follow what at most can only be urged as a technical defect in the pleading, which could not, and did not, work any prejudice to the defendant.

Respectfully submitted,

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REESE H. VOORHEES,
Attorneys for Louise H. Adams and Frank H. Adams.

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SUPREME COURT U. S.
FILED
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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 166. 143.

NORTHERN PACIFIC RAILWAY COMPANY,
vs.
LOUISE H. ADAMS AND FRANK H. ADAMS.

BRIEF IN OPPOSITION TO MOTION THAT THE RECORD HERETOFORE FILED BY THE RAILWAY COMPANY STAND AS THE RETURN TO THE WRIT OF CERTIORARI.

It is submitted that the record now on file in this court in the above entitled cause is both incomplete and uncertain and that the motion by the Northern Pacific Railway Company "that the certified copy of the record herein filed with the petition for certiorari stand as the return to the writ" (p. 4 of railway's motion papers) must be denied.

The conclusive evidence showing the record now filed in this court by the railway company not to be the entire and correct record on which the case was heretofore tried is found in the accompanying affidavit, and in the record itself filed by the said railway.

It would seem, in view of the patent deficiency of the record and the character of the motion made, to wit: "that the certified copy of the record herein filed with the petition for certiorari stand as the return to the writ," that the certainty begotten of direct transmission of the whole and undiminished record from the circuit court of appeals to this court may appropriately be insisted upon.

Respectfully submitted,

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REESE H. VOORHEES,
Counsel for Louise H. and Frank H. Adams.

SUPREME COURT OF THE UNITED STATES.

October Term, 1902.

No. 466.

NORTHERN PACIFIC RAILWAY COMPANY,
vs.
LOUISE H. ADAMS AND FRANK H. ADAMS.

STATE OF WASHINGTON,
COUNTY OF SPOKANE. } SS.

C. S. Voorhees, being first duly sworn, upon oath says:—

That he is one of the counsel for Louise H. Adams and Frank H. Adams in the above entitled action in

this court, and has so been at all times since the beginning of said suit in the United States circuit court for the ninth circuit; and replying to the affidavit of Charles W. Bunn, counsel for the above named railway company, in the above entitled cause, filed in support of the said railway's motion, "that the certified copy of the record herein filed with the petition for certiorari stand as the return to the writ" (p. 4 of railway's motion papers), affiant further says that it is not true, as stated by said Charles W. Bunn, that the clerk of the circuit court of appeals of the ninth circuit has informed either this affiant or Reese H. Voorhees, the only counsel or attorneys at any time representing the said Louise H. Adams and Frank H. Adams in this action, "that the record heretofore filed in this court with the petition constituted the entire and correct record," but, on the contrary, affiant asserts the truth to be that said clerk informed said counsel for said Louise H. and Frank H. Adams that the entire and correct record has never been sent out of said circuit court of appeals, and that an entire and correct record has never been, and is not now, filed in this court, and that whatever character of record has been filed in this court, there is certain matter forming a part of the record below omitted therefrom, to-wit: certain exhibits, a true copy of the letter from said clerk giving such information, being attached hereto and made a part hereof as Exhibit "A." That the exhibits so affirmatively shown to be omitted from the record were, many of them, not set out at length in the

printed record used in the court below, but were referred to in said printed record, and were sent to and received, held and used by the court below as a part of the record in said action. That some of said exhibits were a large map of said railroad, a photograph of the place of the killing, a diagram, a train sheet, a time card or running schedule, a finger ring, etc., etc., those named, if the record now filed in this court is the part of the record which was printed in the court below, are referred to on the following pages thereof, to-wit: pages 298-308, 798, 204, 514-519, 258-259, 211, but are not set out therein, and are, together with other exhibits, still in possession of the said clerk of the circuit court of appeals.

This affiant further says that it is true that the said clerk, after disclosing the incomplete state of the record as sent from his office, and that he did not know of his own knowledge the character of the record actually filed in this court, since such record was not sent to this court by said clerk, but was mailed by him to the said railway company (Exhibit "A"), wrote subsequently to said counsel for said Louise H. and Frank H. Adams, after correspondence with the said Charles W. Bunn, that "the entire record was heretofore certified and used in the Supreme Court on the application for the writ of certiorari" (a true copy of said letter being annexed hereto as Exibit "B"), but affiant says that the prior information given by said clerk showing want of actual knowledge by said clerk as to what was actually filed in this court (irrespective of the omitted exhibits), made it highly disregardful of the care and protection said

counsel for Louise H. and Frank H. Adams owe their said clients, in the absence of certain knowledge of their own as to the character of the record filed by the said railway company, for said counsel to stipulate as to the sufficiency thereof.

And further affiant saith not.

C. S. VOORHEES.

Subscribed and sworn to before me this third day of January, 1903.

(Notarial Seal)

FRED. C. PUGH,
Notary Public in and for the state of Washington, residing at Spokane, Wash.

Exhibit A.

Office of the Clerk
U. S. CIRCUIT COURT OF APPEALS,
San Francisco.
FRANK D. MONCKTON, Clerk.

15 Nov., 1902.

Messrs. VOORHEES & VOORHEES,
Attorneys at Law,
Spokane, Wn.

DEAR SIRS:

Replying to yours of the 11th instant will state that the record heretofore mailed to counsel for the plaintiff in error in case of Northern Pacific Railway Co. v. Adams

et al., No. 707 here, was a certified copy of the entire printed record, together with the opinion and judgment of this court, all duly certified. The exhibits are still in my custody, but they will be forwarded to the clerk of the Supreme Court of the United States when I make return to the writ of certiorari.

Very truly yours,

F. D. MONCKTON,
Clerk.

Exhibit B.

Office of the Clerk
U. S. CIRCUIT COURT OF APPEALS,
San Francisco.
FRANK D. MONCKTON, Clerk.

2 Decr., 1902.

Messrs. VOORHEES & VOORHEES,
Attorneys at Law,
Spokane, Washington.

DEAR SIRS:

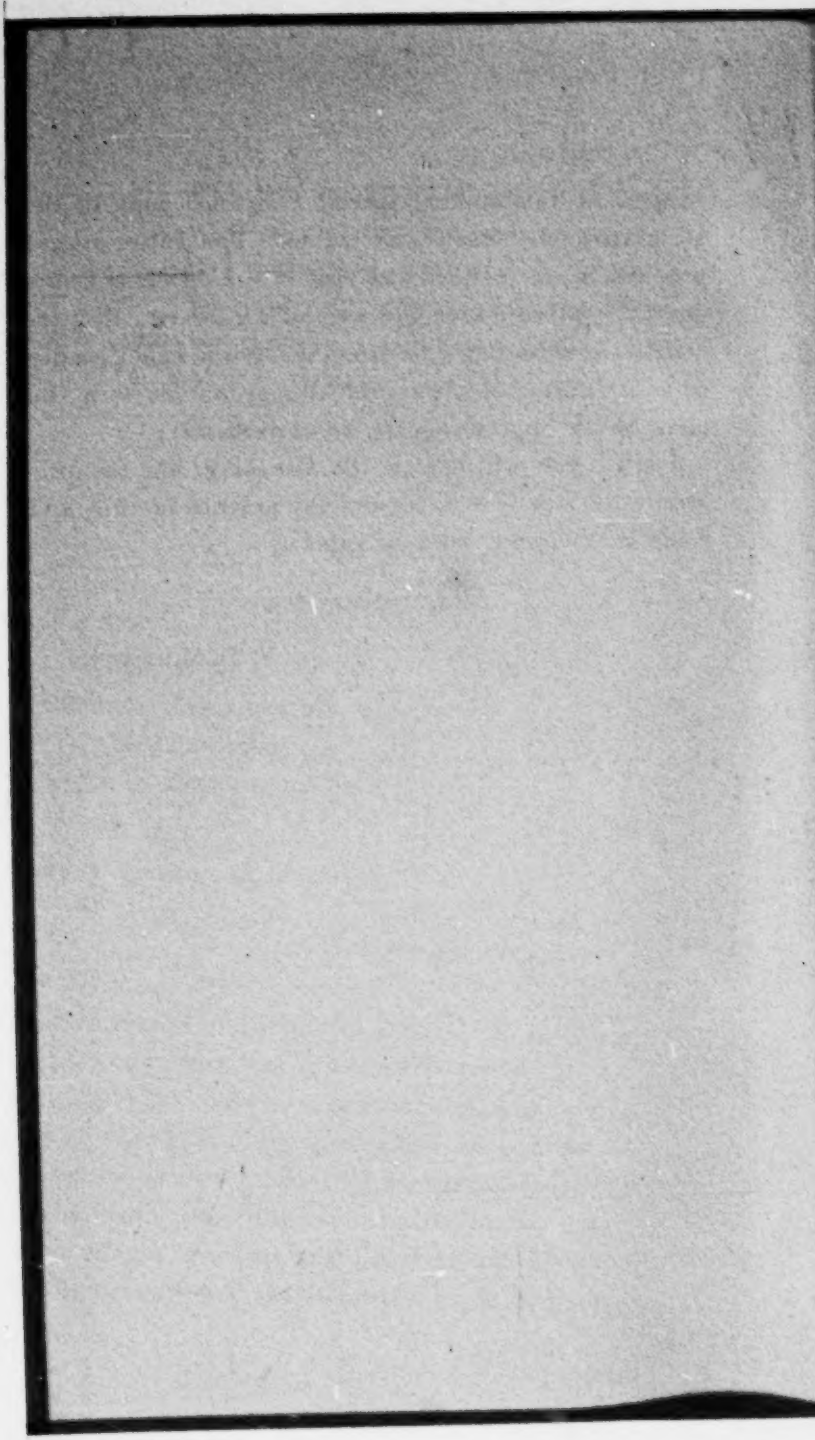
I am in receipt of a letter from Mr. C. W. Bunn, relative to my return to the writ of certiorari in Northern Pacific Railway Company v. Adams et al., and have suggested to Mr. Bunn that, inasmuch as you recently wrote me in regard to the record heretofore certified, you would probably be willing to stipulate that the record now on file in the Supreme Court be considered the record in the case and that my office could make return

to the writ by annexing thereto a certified copy of the stipulation of counsel referred to. The entire record was heretofore certified and used in the Supreme Court on the application for the writ of certiorari. If I re-certify the record as a return to the writ it would simply be a duplication of the record already on file with the clerk of the Supreme Court, and unnecessary.

I trust you will pardon the foregoing, but the procedure referred to has become the practice in this, and I think all circuit courts of appeals.

Very truly yours,

F. D. MONCKTON,
Clerk.



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Supreme Court of the United States.

No. 143.—October Term, 1903.

Northern Pacific Railway Company, Petitioner, vs. Louise H. Adams and Frank H. Adams.	On writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[February 23, 1904.]

A statute of Idaho reads as follows:

"When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or, if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as, under all the circumstances of the case, may be just." (Revised Statutes of Idaho, § 4100.)

Jay H. Adams resided in Spokane, Washington. He was a lawyer and the attorney of several railway companies, though not in the employ of petitioner. He was a frequent traveler on petitioner's and other railways. On November 13, 1898, he with a friend started on one of petitioner's trains from Hope, Idaho, to Spokane. The train consisted of an engine and eight cars, those behind the express car being in the following order: smoking car, day coach, tourist sleeper, dining car, Pullman sleeper. All were vestibuled except the tourist sleeper immediately in front of the dining car. It had open platforms, as an ordinary passenger coach. Shortly after leaving Hope, Mr. Adams, then in the smoking car, went back to the dining car for cigars. To reach the dining car he passed through the day coach and the tourist sleeper. After buying cigars he left the dining car and went forward. This was the last seen of him alive. His body was found the next day opposite a curve in the railroad track about six miles west of Hope. There was no direct testimony as to how he got off the train, whether by an accidental stumble, or by being thrown therefrom through the lurching of the train which was going at a high rate of speed. The road from Hope to the place where the body was found is in Idaho. He was riding on a free pass, containing these provisions:

"Conditions.

"This free ticket is not transferable, and, if presented by another person than the individual named thereon, or if any alteration, addition or erasure is made upon it, it is forfeited, and the conductor will take it up and collect full fare.

"The person accepting this free ticket agrees that the Northern Pacific Railway Company shall not be liable, under any circumstances, whether of negligence of agents or otherwise, for any injury to the person, or for any loss or damage to the property, of the passenger using the same.

"I accept the above conditions.

JAY H. ADAMS.

"This pass will not be honored unless signed in ink by the person for whom issued."

This action was brought by the plaintiffs, the widow and son of the deceased, in the Circuit Court of the United States for the District of Washington. Verdict and judgment were in their favor for $14,000, which were sustained by the Court of Appeals for the Ninth Circuit, (54 C. C. A. 196; 116 Fed. Rep. 324,) and thereupon the case was brought here on a writ of certiorari. (187 U. S. 643.)

Mr. Justice BREWER delivered the opinion of the Court.

As the negligence of the company, found by the jury to have caused the death, as well as the resulting death took place in Idaho, the plaintiffs' right of action rests on the statute of that State. What is the scope and meaning of that statute? The Circuit Court charged the jury:

"You are not to consider what was the duty of this carrier toward Mr. Adams who was killed, but the duty which the defendant owed to these plaintiffs; and the duty which they have the right to exact from the defendant in this case is the same duty which the defendant company owed to the public in general."

In other words, although it should appear that the company in no respect failed in its duty to the deceased, it could yet be held responsible to the widow and son for the damages they suffered by reason of the death. But that is a misconception. Their right of action arises only when his death is caused by "the wrongful act or neglect." If there be no omission of duty to the decedent, his heirs have no claim. Suppose an individual is wantonly assailed and in order to protect his own life is obliged to kill the assailant, may the heirs of the decedent have that act of taking life, rightful as against the decedent, adjudged wrongful as against them, and recover damages from one who did only that which his duty to himself and family required him to do? The statute does not provide that when one's life is taken by another the heirs of the former may recover damages, but only when it is wrongfully taken, that is, when it is taken in violation of the rights of the decedent, wrongful as against him. "Neglect" stands in the same category with "wrongful act." It implies some omission of duty. The trial court in this case charged the jury:

"Negligence to create a liability on the part of parties in fault must be a failure to observe the degree of care and prudence that is demanded in the discharge of the duty which the person charged with the negligence owed under the peculiar circumstances of the case to the injured party."

As stated in Pollock on Torts, p. 355, quoting from Baron Alderson in *Blyth* v. *Birmingham Waterworks Company*, (11 Ex. 784, 25 L. J. Ex. 213):

"'Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do,' provided, of course, that the party whose conduct is in question is already in a situation that brings him under the duty of taking care."

The two terms, therefore, wrongful act and neglect, imply alike the omission of some duty, and that duty must, as stated, be a duty owing to the decedent. It cannot be that, if the death was caused by a rightful act, or an unintentional act with no omission of duty owing to the decedent, it can be considered wrongful or negligent at the suit of the heirs of the decedent. They claim under him, and they can recover only in case he could have recovered damages had he not been killed, but only injured. The company is not under two different measures of obligation—one to the passenger and another to his heirs. If it discharges its full obligation to the passenger, his heirs have no right to compel it to pay damages.

Did the company omit any duty which they owed to the decedent? He was riding on a pass which provided that the company should "not be liable, under any circumstances, whether of negligence of agents or otherwise, for any injury to the person." He was a free passenger, paying nothing for the privilege given him of riding in the coaches of the defendant. He entered those coaches as a licensee, upon conditions which he, with full knowledge, accepted. He was not a passenger for hire, such as was held to be the condition of the parties recovering in *Railroad Company* v. *Lockwood*, (17 Wall. 357,) and *Railway Company* v. *Stevens*, (95 U. S. 655.) In the first of these cases Mr. Justice Bradley, who delivered the opinion of the court, closed an elaborate discussion of the questions with these words:

"We purposely abstain from expressing any opinion as to what would have been the result of our judgment had we considered the plaintiff a free passenger instead of a passenger for hire."

The question then is distinctly presented whether a railroad company is liable in damages to a person injured, through the negligence of its employes, who at the time is riding on a pass given as a gratuity, and upon the condition known to and accepted by him that it shall not be responsible for such injuries. It will be perceived that the question excludes injuries resulting from wilful or wanton acts, but applies only to cases of ordinary negligence. The facts of this case certainly do not call for any broader inquiry than this. The specific matters of negligence charged are the placing a non-vestibuled car in a vestibuled train, and the high rate of speed at which the train passed around the curve at the place

of injury. But non-vestibuled cars are in constant use all over the country—were the only cars in use up to a few years ago—and further, the deceased, having passed over the open platform, knew exactly its condition. As the court charged the jury, "Mr. Adams must be presumed to have known that it was not vestibuled and to have acted with perfect knowledge of the fact." The rate of speed was no greater than is common on other trains everywhere in the land, and the train was, in fact, run safely on this occasion. We shall assume, however, but without deciding, that the jury were warranted, considering the absence of the vestibuled platform and the high rate of speed in coming around the curve, in finding the company guilty of negligence; but clearly it was not acting either wilfully or wantonly in running its trains at this not uncommon rate of speed, and all that can at most be said is that there was ordinary negligence. Is the company responsible for injuries resulting from ordinary negligence to an individual whom it permits to ride without charge on condition that he take all the risks of such negligence?

This question has received the consideration of many courts and been answered in different and opposing ways. We shall not attempt to review the cases in State courts. Among those which hold that the company is not responsible may be mentioned *Rogers* v. *Kennebec &c. Company*, (86 Me. 261;) *Quimby* v. *Boston &c. Railroad Company*, (150 Mass. 365;) *Griswold* v. *New York &c. Railway Company*, (53 Conn. 371;) *Kinney* v. *Central Railroad Company*, (34 N. J. Law, 513;) *Payne* v. *Terre Haute &c. Railway Company*, (157 Ind. 616;) *Muldoon* v. *Seattle City Railway Company*, (7 Wash. 528; Id. 10 Wash. 311.) This last case was decided by the Supreme Court of the State, in which the Federal court rendering the judgment in controversy was held. The English decisions are to the same effect. (*McCawley* v. *Furness Railway Company*, L. R. 8 [Q. B.] 57; *Hall* v. *Northeastern Railway Company*, 10 L. R. [Q. B.] 437; *Duff* v. *Great Northern Railroad Company*, Ir. L. R. 4 Com. Law, 178; *Alexander* v. *Toronto &c. Railway Company*, 33 Up. Can. [Q. B.] 474.) Among those holding that the company is responsible are: *Rose* v. *Des Moines Valley Railroad Company*, (39 Ia. 246,) though that case is rested partially on a State statute; *Pennsylvania Railroad Company* v. *Butler*, (57 Pa. 335;) *Mobile & Ohio Railroad Company* v. *Hopkins*, (41 Ala. 486;) *G., C. & S. F. Railway Company* v. *McGown*, (65 Tex. 640.)

Turning to the decisions of this court, in *Philadelphia & Reading Railroad Company* v. *Derby*, (14 How. 468,) and *Steamboat New World* v. *King*, (16 How. 469,) the parties injured were free passengers, but it does not appear that there were any stipulations concerning the risk of negligence, and the companies were held guilty of gross negligence. In *Baltimore & Ohio &c. Railway* v. *Voigt*, (176 U. S. 498,) Voigt, an express messenger riding in a car set apart for the use of an express company, was injured by the neg-

ligence of the railway company. There was an agreement between the two companies that the former would hold the railway company free from all liability for negligence, whether caused by the negligence of the railway company or its employes. Voigt entering into the employ of the express company, signed a contract in writing, whereby he agreed to assume all the risk of accident or injury in the course of his employment, whether occasioned by negligence or otherwise, and expressly ratified the agreement between the express company and the railway company. It was held that he could not maintain an action against the railway company for injuries resulting from the negligence of its employes. Mr. Justice Shiras, who delivered the opinion of the court, reviewed many State decisions, and concluded with these words (p. 520:)

"Without enumerating and appraising all the cases respectively cited, our conclusion is that Voigt, occupying an express car as a messenger in charge of express matter, in pursuance of the contract between the companies, was not a passenger within the meaning of the case of *Railroad Company* v. *Lockwood;* that he was not constrained to enter into the contract whereby the railroad company was exonerated from liability to him, but entered into the same freely and voluntarily, and obtained the benefit of it by securing his appointment as such messenger, and that such a contract did not contravene public policy."

In the light of this decision but one answer can be made to the question. The railway company was not as to Adams a carrier for hire. It waived its right as a common carrier to exact compensation. It offered him the privilege of riding in its coaches without charge if he would assume the risks of negligence. He was not in the power of the company and obliged to accept its terms. They stood on an equal footing. If he had desired to hold it to its common law obligations to him as a passenger, he could have paid his fare and compelled the company to receive and carry him. He freely and voluntarily chose to accept the privilege offered, and having accepted that privilege cannot repudiate the conditions. It was not a benevolent association, but doing a railroad business for profit; and free passengers are not so many as to induce negligence on its part. So far as the element of contract controls, it was a contract which neither party was bound to enter into, and yet one which each was at liberty to make, and no public policy was violated thereby.

It follows from these considerations that there was error in the proceedings of the Circuit Court and Court of Appeals. The judgments of those courts will be reversed and the case remanded to the Circuit Court with instructions to set aside the verdict and grant a new trial.

Mr. Justice HARLAN and Mr. Justice MCKENNA dissent.